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The Relocation of Children and Custodial Parents: Public Policy, Past and Present*

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[**Author's note:** While this article was in press, the California Supreme Court rendered a 6-1 decision in *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996). The court's opinion shares much of the reasoning set forth in this article. A custodial parent has a presumptive right to change the children's residence that applies in either an initial custody case or a modification action. Noting "the paramount need for continuity and stability in custodial arrangements," Justice Mosk's majority opinion emphasizes maintaining the custodial household and grants deference to the factual custodial relationship. The legislature's endorsement of frequent and continuing contact with both parents, he writes, "[does] not specify a preference for any particular form of 'contact'." Nor does it constrain the trial court's best-interest decision or impose a burden of proof on those wishing to relocate. Specifically declining to require that trial courts "micromanage . . . everyday decisions about career and family," the opinion states that a court may not require either parent to justify a residential choice. Rather, the majority notes the "ordinary needs for *both* parents after a marital dissolution to secure or retain employment, pursue

* © 1995 Carol S. Bruch and Janet M. Bowermaster. This article is an outgrowth of an *amici curiae* brief submitted by the authors on behalf of nine California law professors to the California Supreme Court in the case of *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996). See Brief of Scott Altman et al., California Supreme Court No. S046116 (Sept. 22, 1995) (Carol S. Bruch, Attorney for Amici Curiae, and Janet Bowermaster, Of Counsel). Professor Bruch is the primary author of Parts I and II of this article; Professor Bowermaster is the primary author of Part III. The authors express their appreciation to Margaret Durkin, Dana Baker, Karen Snyder and Jennifer Durynski for their generous assistance.

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education or career opportunities, or reside in the same location as a new spouse or other family or friends." Terming it "unrealistic" to assume that former spouses will remain in the same location, the opinion holds that it is improper for a court to "exert pressure on them to do so." Although the court imposes a heavy burden on a person seeking to change custody, it directs special attention to the wishes of older children and points out that modification of contact and visitation is available where a change of custody is not. Also while this article was in press, the Tennessee Supreme Court decided *Aaby v. Strange*, 1996 WL 189801 (Tenn. April 22, 1996), in which it articulated a presumption that custodial parents would ordinarily be allowed to relocate with their children. After carefully reviewing and clarifying the principles enunciated for relocation disputes in *Taylor v. Taylor*, 849 S.W.2d 319 (Tenn. 1993), the court authorized the custodial mother's relocation to Kentucky with her child. Writing for the majority, Justice Drowota noted the "collective wisdom of both the courts and child psychologists that children, especially those subjected to the trauma of divorce, need stability and continuity in relationships most of all." This rationale, he explained, underlies the well-established rule that courts will not hear a change of custody petition unless there has been a change in circumstances that has rendered the custodial parent unfit or has exposed the child to some form of risk. Of course, the noncustodial parent may seek a change of custody based on a material change of circumstances other than the move itself. However, the court cautioned, a move is potentially disruptive for any child. Expert mental health testimony that removal would be generally detrimental to the child, therefore, usually will not establish an injury that is specific and serious enough to justify the drastic measure of changing custody. Only if the noncustodial parent can show "that the custodial parent's motives for moving are vindictive—that is, intended to defeat or deter . . . visitation rights," will the custodial parent be prevented from removing the child from the state.]

I. Introduction

Parents who separate or divorce are taking but one step in a series of important and often difficult life choices that affect their own futures and those of their children.¹ Sooner or later, one or both may remarry, have new children, change jobs, change careers, or relocate. There is

1. The terms "separate" and "separation" are used here for convenience only. Many children are born to parents who have never shared a household. These children's relationships to their primary caretakers are entitled to at least the same level of deference as are those of children whose parents once lived together. Indeed, if the men who fathered them are not protected by state or constitutional law, these children's relationships with their mothers are entitled to even greater protection in the relocation context. See, e.g., CAL. FAM. CODE § 3010(a) (West 1994) (granting equal custody rights only to those who meet the statutory definition of "presumed father").

nothing new in this, of course, but both the frequency with which families face these changes and the attitudes we hold about them are.

Public perceptions concerning children's welfare have changed dramatically in recent years, as have views on appropriate parental roles. In the post-divorce period, for example, both parents are now expected to contribute financially and emotionally to their children's continuing needs.

Mental health researchers and courts have been struggling to measure these changes and to understand their relevance for custody cases. A growing body of social science literature has identified the child's relationship with its primary caretaker as the single most important factor affecting its welfare when the child's parents do not live together. State supreme courts, too, have recognized the importance of the child's relationship with its custodial parent. They have, for example, generally protected the custodial household, even when the custodial parent wishes to relocate and this affects the child's contact with the other parent. In doing so, they have often operated against a tide of restrictive lower court rulings that prohibit a child's relocation in order to preserve or enhance existing visitation schedules. Indeed, supreme court opinions that support relocation opportunities have sometimes encountered so much resistance that the courts that rendered them have been moved to either issue further, more strongly worded opinions or, where they have had the option, to summarily reverse strings of decisions that have sought to avoid their logic.

Because there is a serious gap between popular perceptions and private realities concerning post-divorce parenting,² custody orders that genuinely seek to serve children's interests may actually disserve them.

2. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DIMENSIONS OF CUSTODY* 271 (1992) ("In short, despite some revolutionary changes in the law to eliminate gender stereotypes and to encourage greater gender equity, the characteristic roles of mothers and fathers remain fundamentally different"). The authors explain, "Although fathers [in intact households] were often involved in the day-to-day lives of their children, we judge (on the basis of other studies as well as our own) that on average they usually spent much less time alone with the children and did not normally share equally in the responsibility of child care on an everyday basis." *Id.* at 268. These general patterns were maintained after divorce: "[W]e found that the distribution of outcomes was again heavily weighted toward a traditional pattern of child care. . . . In about 10 percent of the households, there was some reversal of the traditional roles in that the children lived with the father. . . ." *Id.* Even the one out of six families in which residential arrangements were "more evenly balanced," "the division of child-rearing responsibilities was not typically 50-50," with two-thirds of these children spending more overnights with their mothers than their fathers and with mothers handling matters such as doctors' appointments and the purchase of everyday clothing. *Id.* at 268-69.

This is often true when a parent with primary responsibility for the children's day-to-day care wishes to relocate.³

As a result, custodial parents in many states are unable to make reasonable plans for themselves and their families (to accept a new job, to move closer to grandparents, to enroll in a college or graduate school program outside the local commute area, to escape hostility or violence directed at them or their children, to find affordable housing in a nearby community, to remarry someone from another community or state, or to accompany a new spouse on a job transfer) without placing the custody of their children seriously at risk.⁴ Unless they obtain the consent of their former spouses or lovers,⁵ they are routinely subjected to delays and litigational burdens—burdens greater than those imposed by the criminal law on those who wish to relocate but are subject to probation or parole supervision. Indeed, even if the parent who challenges a move is unqualified for or uninterested in obtaining custody, the custodial parent faces costly litigation. If commitments are made and kept in a timely fashion, whether to an employer, a prospective spouse, a landlord or an educational institution, a loss of custody may result.⁶

This state of the law provides inappropriate opportunities for abuses of power by former partners and is a serious disservice to children and to their primary caretakers. It has made the job of rearing children after parental separation or divorce far more financially and emotionally burdensome than sound policy requires or should condone.⁷

3. See, e.g., FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 75 (1991) (parental conflict and the custodial parent's ability to function have more impact on children's adjustment than custody and visitation arrangements); Letter from Judith S. Wallerstein, Executive Director, Center for the Family in Transition, to Senator Bill Lockyer, Chair, Senate Judiciary Committee, California Senate 2 (May 10, 1993) ("to face the custodial parent [by means of a restriction on relocation] with having to choose between reestablishing his or her life . . . and losing custody of the child is detrimental to the psychological adjustment of that parent and burdens the parent/child relationship whichever way the decision is made") (emphasis added). See also notes 55 & 58 *infra*.

4. The difficult policy questions raised by seemingly frivolous decisions to relocate or those designed to interfere with the noncustodial parent's access to the children are discussed in the text following note 77 and in notes 57-71, 76 & 156 *infra* and accompanying text.

5. It is, of course, possible that the custodial parent will have children by more than one former partner, or that spouses in a second marriage will each have the primary custody of children from prior relationships.

6. See, e.g., *Who Gets the Kids?*, CALIF. LAW., April 1993, at 24, 25: "Many family law attorneys believe that if the mother tried to move today, she could do so only by giving up custody. But they acknowledge they don't really know under what circumstances a parent would be allowed to retain custody."

7. Because most custodial parents are women and because they are far more financially vulnerable than the children's fathers after separation, the unfortunate gender-specific implications of restrictive relocation practices are apparent. Sum-

It is also inconsistent with the reality of American geographic mobility.⁸ Each year approximately one American in five changes residences. According to 1983 rates, a newborn American will probably move about 10.5 times during his or her lifetime, with approximately 3.8 of these moves transcending county boundaries.⁹ Employer-initiated job transfers are an important reason behind this mobility.¹⁰ Faced with the economic worries of the post-divorce period, custodial parents require flexibility in their job-seeking strategies, both because of their own employment needs and, if they have remarried, as a result of the employment demands faced by their new spouses.¹¹

Part II of this article examines these developments, highlighting the renewed relevance of family policies articulated more than a century

marizing the work of Sara McLanahan of Princeton University, Furstenberg and Cherlin note:

[A]lmost two fifths of divorced mothers move in the first year after divorce, a rate far higher than the occurrence for stably married families during the same interval. Even after the first year, divorced women continue to move at a rate of about 20 percent a year, about one third more often than women in intact marriages. More of the moves reported by divorced women resulted from necessity than choice, especially in the immediate aftermath of divorce. During the first year after divorce, 15 percent of the divorced women were forced to move—seven times the rate of forced moves among stably married women.

FURSTENBERG & CHERLIN, *supra* note 3, at 54-55 (citing Sara S. McLanahan, *Family Structure and Stress: A Longitudinal Comparison of Two-Parent and Female-Headed Families*, 45 J. MARRIAGE & FAM. 347 (1983)).

8. See generally Jennifer L. Janeiro, California Move-Away Law and the Need for Change 12-14 (unpublished 1994) (on file with Professor Bruch).

9. Kevin E. McHugh, Book Review, 67 ECON. GEOGRAPHY 376 (1991) (discussing chapter by Robert R. Sell in *LABOUR MIGRATION* (James H. Johnson & John Salt eds., 1990)).

10. In 1993, for example, the California Governor's Office of Planning and Research projected the loss of 200,000 jobs and \$7 billion in personal income in the state because of military base closures. State of California, Governor's Office of Planning and Research, California Military Base Closures Summary Information (July 1993). Such state-specific economic plights encourage long-distance relocations by custodial parents who are dependent on wages for their families' support. See also note 7 *supra*.

11. Remarriage affects the lives of most custodial mothers. About 50% of all non-African American divorced mothers who are eligible for spousal support will remarry within 5 years of divorce. Karen Fox Folk et al., *Child Support and Remarriage*, 13 J. FAM. ISSUES 142, 154 (1992). Ultimately, it is estimated approximately 70% of all divorced women will remarry. Arthur J. Norton & Jeanne E. Moorman, *Current Trends in Marriage and Divorce Among American Women*, 49 J. MARRIAGE & FAM. 3, 13 (Alan Booth et al. eds., 1987). About 50% of women who remarry during their childbearing years have children with their new husbands. Lynn White, *The Effect of Parental Divorce and Remarriage on Parental Support for Adult Children*, 13 J. FAM. ISSUES 234, 236 (1992). This means that, in the event of her new husband's need to work outside the area, a remarried woman may be required to choose between separation from her children from a prior marriage or separation from her new spouse and, perhaps, her children by him. Janeiro, *supra* note 8; see also *infra* note 110 and accompanying text.

ago. Using California custody law as an example, it addresses traditional views about custody jurisdiction and parental rights as well as the contemporary influence of joint custody doctrines and statutes favoring "frequent and continuing contact" between children and noncustodial parents. It examines these doctrines in light of the child's best interest as articulated in case law and illuminated by mental health research. Part III then compares California law to developments in sister states and finds that the national trend it identifies, which restores a custodial parent's relocation opportunities, is in harmony with contemporary social science research and contemporary public policy goals.

II. Legal and Policy Issues: California's Example

A. *Stability in the Primary Relationship*

California law, like that of its sister states, resolves parental custody disputes according to the child's best interest.¹² The proper application of this standard when one parent seeks to remove a child from its established household with the other parent (whether at the time of an initial order or in the context of a modification request) has been treated by the California Supreme Court once in each of the past two decades.¹³ Both of these supreme court cases have emphasized the importance to the child of continuity in its primary emotional relationship. If one parent has provided the child's primary care, under these opinions it is presumptively in the child's best interest that this primary role be maintained.¹⁴

The first case, *In re Marriage of Carney*,¹⁵ dealt with a de facto primary caregiver (the father), while the second, *Burchard v. Garay*,¹⁶ involved a parent who had been the child's primary caregiver both before and after the entry of a custody order (the mother). Although it drew distinctions as to what evidence could be introduced to support a transfer of the child's actual custody, in both the pre- and post-decree contexts, the California court emphasized the child's need for stability in its primary parenting relationship.¹⁷ It was this vital relationship (rather than geographical proximity to both parents or other conceivable factors) that its opinions considered to be of paramount importance.

Neither case dealt with the application of its principles in the context of a proposed relocation by the custodial parent. Neither, accordingly,

12. See, e.g., CAL. FAM. CODE § 3040 (West 1994).

13. See *In re Marriage of Carney*, 598 P.2d 37 (Cal. 1979); *Burchard v. Garay*, 724 P.2d 486 (Cal. 1986).

14. *Carney*, 598 P.2d at 38; *Burchard*, 724 P.2d at 488-91.

15. 598 P.2d 37 (Cal. 1979).

16. 724 P.2d 486 (Cal. 1986).

17. *Carney*, 598 P.2d at 38; *Burchard*, 724 P.2d at 489, 490-91.

dealt with a state statute that specifically addresses relocation questions in traditional terms.¹⁸ Employing language that has been in the California codes since 1872, the section provides, "A parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child."¹⁹

This provision is an almost verbatim copy of section 104 of David Dudley Field's 1865 proposed Civil Code of New York.²⁰ Both sources cite in turn the 1836 case of *Wood v. Wood*,²¹ decided by New York's highest equity court, with the intention of clarifying the statutory language.²² These codifications are, in other words, restatements of nineteenth century relocation case law.

18. CAL. FAM. CODE § 7501 (West 1994).

19. *Id.*; the section is derived from former CAL. CIV. CODE § 213.

20. Section 104 read: "A parent entitled to the custody of a child has a right to change his residence, subject to the power of the supreme court to restrain a removal which would prejudice the rights or welfare of the child." NEW YORK (STATE) COMMISSIONERS OF THE CODE, THE CIVIL CODE OF THE STATE OF NEW YORK § 104 (1865) [hereinafter FIELD CODE]. In New York the supreme court is the trial court of general jurisdiction.

Although New York never adopted the Field Code, amended versions were enacted by the Dakota Territory, California (1872), Idaho (1887) and Montana (1895). Edgar Bodenheimer, *Is Codification an Outmoded Form of Legislation?*, 30 AMER. J. COMP. L. 15, 16 (1982). Its enactment in California was supported by Field's brother, Stephen J. Field, then an influential member of the California legislature and later a justice of the California and United States Supreme Courts. Charles E. Clark, *Code Pleading and Practice Today*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS 55, 56 (Alison Reppy ed., 1949). The supreme courts of Montana and South Dakota have decided relocation cases in recent years under their versions of § 104. See *infra* notes 85-104 and accompanying text.

21. 5 Paige Ch. *596 (1836).

22. The introduction to the New York Commissioner's final report explains the relevance of the cases cited in its draft:

So far as reported cases serve for illustration, the present Code makes use of them; for the references to adjudged cases, which in most instances follow the sections, are intended . . . to answer the purpose of illustration It is a favorite idea . . . that, for promoting certainty, the propositions of a Code should be accompanied by illustrative examples. . . . [T]hese references, it is supposed, will afford the best kind of illustration.

FIELD CODE, *supra* note 20, at xx-xxi. The preface to the first annotated Civil Code of California, prepared by two of the three California Code Commissioners, puts it somewhat differently:

It is, then, the object of the notes attached to the various sections of the Codes to explain the *reason and intent* of the law, to make it clear and easy of comprehension, and to show its application, not only generally, but to circumstances which, though within the *principle*, may not fall strictly within the *letter*, of the statute.

1 CAL. CIV. CODE, Preface, at vi (1872) (Haymond and Burch) (emphasis in original). As to Field's philosophy of codification, see Alison Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD, *supra* note 20, at 17, 29-30.

Wood and the cases it cites focus on two concerns: (1) preserving the court's jurisdiction, and (2) deciding when judicial interference with a custodial parent's decisions is authorized. How these issues were resolved in *Wood* and the resulting Code language provide interesting insights into contemporary relocation analysis.

Wood dealt with the possible removal of children from New York State to Ohio pursuant to the provisions of their father's will. The court, in deferring instead to their mother's wishes, stated that it had

no doubt as to the right of a parent or guardian to change the residence of his infant children . . . from one state to another, provided such change of residence is made in good faith and with a view to their benefit; subject, however, to the power of this court to restrain an improper removal It must be a very extreme or special case, however, which would induce this court to interfere with the natural rights of a parent in this respect.²³

1. PRESERVING THE COURT'S JURISDICTION

The Field Code proposal and the California enactment, like *Wood*, speak of the court's power to restrain a "removal," terminology that suggests the taking of a child beyond the jurisdiction. Indeed, *Wood* relies on earlier cases that expressly prevented a child's removal in order to maintain the court's exclusive custody jurisdiction,²⁴ a motive that reappears in California cases.²⁵

Such jurisdictional concerns have been greatly ameliorated in recent years, however, and, as a consequence, there is far less need

23. 5 Paige Ch. at *605.

24. *See* *De Manneville v. De Manneville*, 10 Ves. 52, 65, 32 Eng. Rpt. 762, 767-68 (1804) (Chancery) ("Some method must be taken to secure to the Court, that the person of the child shall remain in this country."). Two other cited cases discussed extra-territorial removal, the applicable standards and the power of the court to remove a child from its father's custody, using jurisdictional language, but are less clearly based on geographic jurisdiction over the child's person. *See* *Wellesley v. Wellesley*, II Bligh N.S. 124-26, 4 Eng. Rpt. 1078-79 (1828) (House of Lords) (both aspects involved in case, although at different times); *Cruze v. Hunter*, 2 Cox 243, 30 Eng. Rpt. 113 (1790) (Chancery).

25. *See, e.g.*, *Titcomb v. Superior Court*, 220 Cal. 34, 39-43 (1934), which describes the doctrines that permitted a new location to assert jurisdiction over custody matters without regard to earlier orders and prevented the children's legal residence from asserting jurisdiction in their absence. *See also* *Lerner v. Superior Court*, 38 Cal. 2d 676, 681-82, 242 P.2d 321, 324-26 (1952) (Traynor, J.). A related concern is evident in California Family Code § 3063 (West 1994), which provides that a person who is granted custody under an *ex parte* order is automatically restrained from leaving the jurisdiction until a noticed hearing on the custody matter is held; that factual and legal situation is, however, quite different from relocations governed by the Field Code provision, which is set forth in California Family Code § 7501. The language concerning *ex parte* orders was added to the statutes in 1989. 1989 Cal. Stats. ch. 1265, § 1.

today for jurisdiction-protective restrictions. The Uniform Child Custody Jurisdiction Act²⁶ and the Parental Kidnapping Prevention Act²⁷ now require sister states to honor the jurisdiction and orders of local courts, and the Hague Convention on the Civil Aspects of International Child Abduction²⁸ returns wrongfully removed children to the state from forty-two nations,²⁹ protections that extend equally to sister states.

Indeed, the legal situation has changed so dramatically that travel restrictions now often undercut rather than advance the goals of interstate and international child custody law.³⁰ With greater respect else-

26. 9 U.L.A. 123 (promulgated 1968) [hereinafter UCCJA].

27. 28 U.S.C. § 1738A (1988).

28. Convention on the Civil Aspects of International Child Abductions of 25 October 1980, 19 I.L.M. 1501 (1980) [hereinafter Hague Convention]; International Child Abduction Remedies Act, 42 U.S.C. § 11601 (1988) (implementing the Convention).

29. Status as of 9 June 1995, Hague Conference on Private International Law, Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (reflecting entry into force dates through July 1, 1995).

30. Brigitte M. Bodenheimer, *Equal Rights, Visitation, and the Right to Move*, 1 FAM. ADV. 18 (1978); Brigitte M. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978, 1003-12 (1977) (UCCJA's original reporter discusses travel restrictions and implications of joint custody orders for interstate cases); Carol S. Bruch, *And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 2 INT'L J.L. & FAM. 106, 114 (1988), reprinted at 30 FAM. & CONCILIATION CTS. REV. 112, 120 (1992); see also Carol S. Bruch, *International Child Abduction Cases: Experience under the 1980 Hague Convention*, in PARENTHOOD IN MODERN SOCIETY 353, 358-59 (John Eekelaar & Petar Sarcevic eds., 1993). Judicial reluctance to permit a child to reside elsewhere with its primary caretaker may prompt refusals to return children to the United States for custody trials.

Recently, for example, the State Department dealt with a case in which a British woman who was the primary caretaker of her young child had gone home to her parents when her marriage broke down, taking the child with her. Under the Hague Convention, she was ordered to return the child to New Jersey for custody litigation. When she did, the New Jersey court granted her custody, but only if she remained in New Jersey so that the father and his child from a former marriage would have convenient visitation (he with the child, the stepdaughter with her stepmother). The woman was forced to find refuge in a homeless shelter. Although no one counselled the woman to disobey the court order and she did not do so, the State Department official who discussed the case with Professor Bruch thought it likely that the English courts would have refused to return the child a second time if the mother had returned to that country in violation of the court order. (Article 13(b) of the Convention displaces the return obligation when it would endanger the child by placing it in an intolerable situation.) Two years after the litigation began, the father and judge agreed to permit the mother and child to leave this country; the child's grandmother did not know the reasons, but thought it was because the father "is facing bankruptcy and has been in trouble with police for a drug-related incident" and "we suspect he may have found someone else." Letter from L.T. to Carol S. Bruch (May 18, 1995).

In another case, the German Constitutional Court temporarily stayed an order to return a young child to the United States for custody litigation in order to consider

where for the rights established by state law³¹ and by its custody orders, relocation entails less risk than ever to children's rights and welfare, the objects of the relocation section's concern. Always narrow in its intended application, the traditional rule should, accordingly, be expected to authorize yet fewer restrictions on interstate or even international travel.

Such jurisdictional concerns have no place, of course, in intrastate relocations, and it is not surprising that such cases were almost unheard of under California's relocation statute until 1990³² and do not appear in the case law of sister state supreme courts that is discussed in Part III of this article. During the past five years, however, four of the seven California appellate cases concerning relocation have entailed attempts to restrict moves of even short distances within California.³³

whether separating the child from its primary caretaker (who had returned to her family in Germany) would violate the child's best interest, which is protected by the German Constitution. Nr. 385 BVerfG, 41 FAMRZ 663-64 (1995). It is not clear whether the mother's reluctance to return to the United States for trial stemmed from a concern that, even if she was awarded custody, she might not be permitted to return to Germany to rear her child. Although her constitutional argument failed and the stay of the return order was lifted, German authorities have raised concerns about American courts' travel restrictions in conversations with Professor Bruch, who is conducting research on the Convention. These cases and conversations suggest a danger that provincial travel restrictions may prompt exceptions to return that will undercut the Convention's remarkable success in ensuring that custody trials occur in the place of the child's habitual residence and in facilitating visitation across national boundaries.

31. The Hague Convention, for example, returns children whose habitual residence was California if their taking or retention was wrongful under California law. No custody order is required to establish those rights. Hague Convention, *supra* note 28, art. 3.

32. Judicial efforts to restrict intra-California relocation were mentioned only twice, and in only one of these cases, in the context of a threatened interstate move, was the local restriction sustained. *See Ward v. Ward*, 309 P.2d 965, 968 (Cal. Ct. App. 1957) (expressing concern that mother might relocate to Hawaii with children unless restrained and requiring that the children remain resident in Calaveras County); *Heinz v. Heinz*, 157 P.2d 660 (Cal. Ct. App. 1945) (striking provision requiring custodial father to maintain child's residence in Los Angeles County). *Heinz* cited *Luck v. Luck*, 28 P. 787 (Cal. 1892), for the controlling standard: "[I]f he [the father] is entitled to the custody of the children at all, he has the right to name any reasonable place in which they shall abide with him." 157 P.2d at 662.

33. Several of these opinions do not mention the relocation statute. *See In re Marriage of Burgess*, 39 Cal. Rptr. 2d 213 (Cal. Ct. App. 1995) (relocation of 40 miles within state); *In re Marriage of Selzer*, 34 Cal. Rptr. 2d 824 (Cal. Ct. App. 1994) (relocation one-hour away by car within state); *In re Marriage of Battenburg*, 33 Cal. Rptr. 2d 871 (Cal. Ct. App. 1994) (interstate relocation); *In re Marriage of Roe*, 23 Cal. Rptr. 2d 295 (Cal. Ct. App. 1993) (interstate relocation); *In re Marriage of McGinnis*, 9 Cal. Rptr. 2d 182 (Cal. Ct. App. 1992) (relocation approximately three-hours away by car within state); *In re Marriage of Carlson*, 280 Cal. Rptr. 840 (Cal. Ct. App. 1991) (interstate relocation); *In re Marriage of Fingert*, 271 Cal. Rptr. 389 (Cal. Ct. App. 1990) (relocation approximately one-hour away by air within state).

To the extent that these courts seek to retain their personal supervision of a case,³⁴ the goal is fully protected by state rules on continuing judicial jurisdiction and venue, both of which protect local jurisdiction so long as one parent remains in the community.

2. DECIDING WHEN JUDICIAL INTERFERENCE WITH A CUSTODIAL PARENT'S DECISIONS IS AUTHORIZED

These recent relocation cases involve the other arm of *Wood*, which establishes the scope of parental discretion concerning relocation decisions affecting the child.³⁵ This arm, in contrast to the jurisdiction-preserving arm, is of great contemporary significance.

The *Wood* court approved interference with a guardian or parent's decision only in "a very extreme or special case," thereby articulating a high level of respect for the integrity of the custodial household. The fact that Field's formulation was intended to codify this traditional level of deference suggests the gravity of the "prejudice" to the child that the relocation statute requires before intervention may occur.

In other words, a move at the direction of the custodial parent is presumptively authorized, and a very heavy burden is placed on the person who opposes it. As a linguistic matter and as a matter of legislative history, "prejudice to the rights or welfare of the child" requires far more than inconvenience or harm to the noncustodial parent or a mere change in the visitation schedule or in time-share patterns. This view is further supported by the statute's interpretation over many years.³⁶ A faithful reading of the statutory language requires grave,

34. As put by Justice Fairchild of the Wisconsin Supreme Court,

I suppose that one of the fundamental difficulties . . . is that trial judges (if not appellate judges, as well) are somewhat loath to defer to courts of other states.

This may be due to a tendency of any individual to think that in a situation demanding the wisdom of Solomon he can come closer than anyone else.

Address by Justice Fairchild of the Supreme Court of Wisconsin, Conference of Chief Justices, Mim. 8 (August 1961), *quoted in* Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1211 (1969).

35. The older cases posit this, too, as a question of the court's "jurisdiction," usage that has changed in the intervening years. Some concerned the proper roles of chancery versus common law, while others seem more appropriately understood as attempting to articulate the legal justification for supervening parental decisions. *See supra* notes 23-24 and accompanying text. It is this last aspect of the cases and the resulting Code language that is addressed here.

36. Although the cases do not discuss the statute's legislative history or legislative intent, they nevertheless recognize the prerogatives of the custodial parent and that the burden of proof to restrain a move rests on the party challenging the move. *See In re Marriage of Ciganovich*, 132 Cal. Rptr. 261, 263 (Cal. Ct. App. 1976); Walker

demonstrable net harm to the child, a standard significantly higher than that imposed by either a "best interest" or a "detriment" standard.³⁷

B. Recent California Appellate Cases

In recent years, California's law concerning relocation took a dramatic turn as lower courts ignored the traditional relocation statute and confused the state supreme court's call for continuity in the child's primary relationship with continuity in a specific custodial time share

v. Superior Ct., 55 Cal. Rptr. 114, 117 (Cal. Ct. App. 1966); *Forslund v. Forslund*, 37 Cal. Rptr. 489, 500, 505 (Cal. Ct. App. 1964), *Dozier v. Dozier*, 334 P.2d 957 (Cal. Ct. App. 1959), *Heinz v. Heinz*, 157 P.2d 660 (Cal. Ct. App. 1945); *see also* *Luck v. Luck*, 28 P. 787, 787 (Cal. 1892) (discussing right of parent to decide county of residence; no mention of then Civil Code § 213 was made, probably because case did not involve an interstate move). *But see* *Stack v. Stack*, 11 Cal. Rptr. 177 (Cal. Ct. App. 1961); *Ward v. Ward*, 309 P.2d 965 (Cal. Ct. App. 1957). *Forslund* provides an especially clear statement that the removal of a child does not per se provide changed circumstances warranting a change of custody (37 Cal. Rptr. at 500) and a clear articulation of the controlling burden of proof (37 Cal. Rptr. at 505).

37. Because the Field Code employed a "best interest" test for other custody proceedings, it is clear that the "prejudice" standard under § 104 was a distinctive test. Compare FIELD CODE, *supra* note 20, § 104, with *id.* § 127 ("In awarding the custody of a minor . . . the court . . . is to be guided by . . . what appears to be for the best interest of the child . . .").

It was also distinctive from "detriment," a term that was defined only in the context of damages recoveries by § 1833 of the Field Code, *supra* note 20, and its counterpart, § 3282, of the original California Civil Code, *supra* note 22. The "detriment" standard now found in California Family Code § 3041 (West 1994), in contrast, was developed in response to the famous case of *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966), where an Iowa court refused to return a boy to his California father (the child having been sent to live temporarily with his maternal grandparents following the deaths of his mother and sister in an automobile accident). 4 Assembly J. 8060 (1969 Reg. Sess.). The section's legislative history and an application of its amorphous detriment standard can be found in *Guardianship of Marino*, 106 Cal. Rptr. 655 *passim* & n.5 (Cal. Ct. App. 1973). Section 3041 has no application to interparental custody disputes. *See* CAL. FAM. CODE § 3041 (West 1994) ("Before making an order granting custody to a person or persons other than a parent, without the consent of the parents, the court shall make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child."). The Family Code, however, does now permit a court considering the *visitation rights* of a parent with joint custody to refuse visitation upon a finding that visits would be detrimental to the best interest of a child. *Id.* § 3100. This section must be intended to operate in cases in which joint legal custody has been awarded in conjunction with a sole physical custody order; like § 3041, it is irrelevant to the custody decision itself, as opposed to the degree of visitation to be permitted. Because the detriment standard first entered California law almost a century after the Field Code, because it has no application to an award of custody in interparental litigation, and because its legislative history indicates a far less rigorous standard than does the legislative history of "prejudice," it cannot be thought to control the interpretation of the relocation statute, § 7501. Compare the legislative history set forth in *Marino's* footnote 5 with the legislative history of Family Code § 7501 set forth in notes 18-37 *supra* and accompanying text.

or in a particular community. Judicial protection for the noncustodial parent's access accordingly replaced the statutory directive protecting the custodial parent's relocation decision. The result has been a series of cases imposing one or another burden on the custodial parent to justify a relocation rather than the *Wood* rule, under which the custodial parent has no burden to bear.

An example of this confusion is found in *In re Marriage of Carlson*,³⁸ where the court of appeal reasoned that a general legislative policy endorsing frequent and continuing contact between a child and both of its parents³⁹ overrides the Code's express provision concerning relocation and renders obsolete the many pre-1990 appellate decisions made under it.⁴⁰

The *Carlson* court's logic, which seems to have effectively removed the traditional relocation rule from discussion, is currently being tested by *In re Marriage of Burgess*,⁴¹ a case pending before the California Supreme Court. Both California's legislative history and its canons of statutory construction suggest that *Carlson* will not survive this review, and that the court will instead enunciate a contemporary interpretation of the state's relocation statute.

38. 280 Cal. Rptr. 840 (Cal. Ct. App. 1991).

39. Former CAL. CIV. CODE § 4600(a), (b)(1), now found in CAL. FAM. CODE §§ 3020, 3040 (West 1994). Not surprisingly, courts have emphasized the statute's protection of the noncustodial parent's contact with the child. The language, however, actually calls for contact with *both parents*, a point missed or ignored by courts that order a custody transfer without evaluating reductions the order will impose on contact between the child and the parent who had been the primary caregiver. See *infra*, text following note 56. For the purposes of this discussion, the term "noncustodial parent" will refer to a parent who is not in actual practice the child's primary caregiver.

40. 280 Cal. Rptr. at 844-45.

41. 39 Cal. Rptr. 2d 213, 220-23 (Cal. Ct. App. 1995). In this case, Mr. and Mrs. Burgess had agreed to Mrs. Burgess' sole physical custody of their two pre-school-aged children, although they shared legal custody and Mr. Burgess saw the children six days each week. Because Mrs. Burgess worked days and Mr. Burgess worked evenings, they agreed that so long as they remained in the same community and on the same work schedules, Mr. Burgess would see the children Monday through Wednesday mornings (except for the older child's hours at pre-school) and from Thursday morning until Saturday at 9 a.m. They also agreed that if Mr. Burgess changed to day shift, he would see the children instead on alternate weekends from 5 p.m. Friday until 5 p.m. Monday. They did not agree, however, as to arrangements if Mrs. Burgess left the community. When Mrs. Burgess took a better job 40 miles away, as anticipated, the trial court, over Mr. Burgess' objection, permitted her to move there with the children and awarded Mr. Burgess lengthy summer visitation during the remainder of the year from Wednesday night to Sunday night every other week. A divided court of appeals reversed, reasoning that, because she could commute to work, Mrs. Burgess had not established that the move was necessary rather than a matter of convenience. This test applied, in the majority's view, because it found that the move would have a detrimental impact on the nature and amount of Mr. Burgess' contact with his children and, hence, on his relationship with them. [*Editor's note: Burgess* has been decided. See "Author's Note" on page 245.]

Carlson's assertion that the specific relocation statute was overridden by more recent legislation supporting a child's contact with both parents simply goes too far. During the 1979 California legislative session, when the "frequent and continuing contact" language was added to the Code, no discussion of nor reference to visitation (as opposed to contact) occurred, and no desire to affect a parent's choice of residence was articulated.⁴² This is not surprising. Assembly Bill 1480 had originally sought to impose a preference for joint custody.⁴³ Because of strong opposition, the author abandoned all draft language providing for either a presumption or preference favoring joint custody.⁴⁴ Not surprisingly, however, those who had opposed these proposals had articulated no objection to "contact" between the child and both parents.⁴⁵ Contact, after all, can be maintained in many ways—personal visits, telephone calls and letters among them. Because the language favoring contact was an unopposed addition to a bill that had failed in

42. See, e.g., California State Assembly Committee on Judiciary Bill Digest, A.B. 1480 (Imbrecht); California Senate Committee on Judiciary, Background Information: A.B. 1480 (sponsor's statement providing source, purpose and background information); Memorandum re A.B. 1480 from Steven P. Belzer, Committee Counsel, Senate Subcommittee on Administration, to Senator Jerry Smith, Chair, Senate Subcommittee on Administration of Justice and Senate Judiciary Committee. Rather than discussing the possibility that joint custody might require that parents live in the same community, the Assembly Digest points out that geographic proximity might need to be a prerequisite for a grant of joint custody. Assembly Digest at 3 ("Without . . . qualifying language, this bill would require . . . joint custody as a first alternative. . . . Would not practical aspects of joint custody also merit the court's consideration? For example, the geographical proximity between the two parents would be an important factor.").

43. California Senate Committee on Judiciary, Background Information: A.B. 1480 (In an attachment responding to a question about the bill's purpose, the sponsor wrote that the bill "proposes joint physical and legal custody . . . as the first, and priority, consideration . . .").

44. See, e.g., Memorandum of Steven P. Belzer, *supra* note 42, at 2-3 ("Mr. Cook's [the sponsor's] language remains too strong. He wants to return to the joint legal and physical custody language rejected by the Assembly Judiciary Committee The problem remains that first preference . . . goes too far in the view of the bill's opponents."); Letter from James Cook, founder of Equal Rights for Fathers and sponsor of A.B. 1480 (Imbrecht), to Edmund G. Brown, Governor of California (Sept. 12, 1979) ("The present bill does represent a retreat from one principle preferred by proponents of the original A.B. 1480 version: A more distinct and unequivocal preference for joint custody . . . rather than equating joint custody as of equal consideration with sole custody.").

45. See, e.g., Statement of Professor Carol Bruch, Senate Judiciary Committee Hearing on A.B. 1480 (Aug. 21, 1979):

Surely it is appropriate for us to recognize in statutory language that a joint custody decree may be a proper expression of the child's best interests when former spouses are able to cooperate. . . . But a network of provisions that place special restraints upon the court in this one area of custody decisions must be guarded against.

its original purpose of providing an elevated status for joint custody, it cannot fairly be read as creating a preference for either *de facto* or *de jure* joint custody.⁴⁶

If this legislative history were not enough to settle the matter, a further assertion by the *Carlson* court, that substantial time shares are the legislatively preferred custody form, had already been disavowed more than two years before the court's opinion was written: statutory language that expressly permits California courts to choose freely between sole and joint custody was added in 1988 to correct such misreadings of the "frequent contact" language.⁴⁷ In addition, the *Carlson* court's corollary belief that the relocation section, California Family Code § 7501, had been rendered a dead letter was proven wrong as recently as 1994, when proposed legislation to repeal the section was defeated.⁴⁸

Canons of statutory construction, which strongly disfavor repeals by implication and direct courts to harmonize statutes whenever possible,⁴⁹ also establish the continuing force of the Field Code language. As the California Supreme Court recently explained,

"So strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision, '[i]n order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first.'"⁵⁰

The presumption against implied repeals is particularly applicable when, as here, the assertedly repealed statute has been law "for over a century."⁵¹

Given their shared regard for stability in the custodial household and the similarity in the burdens of proof that apply to the section that imposes the "best interest of the child" standard and the section that

46. Only the late Professor Bodenheimer foresaw that the proposal's features, each unobjectionable individually, taken together might produce a perception that the bill "tilted" towards joint custody and that later corrective action might be required. See Statement by Professor Brigitte Bodenheimer, Hearing before Senate Committee on Judiciary (Aug. 21, 1979) ("each one of these changes may not seem to be overly significant").

47. See CAL. FAM. CODE § 3040(b) (West 1994).

48. See, e.g., California Legislature, 1993-94 Regular Session, S.B. 1528 § 2 (Wright) (as introduced, Feb. 16, 1994); *id.*, A.B. 3041 § 2 (Bornstein) (as introduced, Feb. 22, 1994). The bills died in the Senate Judiciary Committee. Senate Final History of 1993 Regular Session; Assembly Final History of 1993-94 Regular Session.

49. *Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist.*, 777 P.2d 157, 163-64 (Cal. 1989).

50. *Droeger v. Friedman, Sloan & Ross*, 812 P.2d 931, 942 (Cal. 1991), quoting *Board of Supervisors v. Lonergan*, 616 P.2d 802, 810 (Cal. 1980), quoting in turn *Penziner v. West American Finance Co.*, 74 P.2d 252, 260 (Cal. 1937).

51. See *In re M.S.*, 896 P.2d 1365 (Cal. 1995).

governs relocations, these statutes can be harmonized without difficulty. To do so would advance children's interests, and it is, accordingly, likely that the California Supreme Court will take this step when it decides *Burgess*. [Editor's note: The court did so, as described on page 245.]

Indeed, even if one were to assume that the noncustodial parent's visitation were vital to a child's well-being, this concern alone would not determine the child's best interest in relocation cases. A move often alters the child's contact with *both* parents and, to some degree, their respective influences on the child's life. But a net detriment to the child's best interest results only if at least two conditions are met: (1) advantages to the child stemming from the move, however great, are insufficient to offset the decreased influence of the noncustodial parent, and (2) prohibiting the proposed relocation will not cause comparable or greater detriment to the child. If the custodial parent moves without the child, for example, another move necessarily takes place—a move to the noncustodial parent's home—and there is a concomitant decrease in the parental influence of the now more-distant primary caretaker. Yet, despite the statute directing frequent and continuing contact with *both* parents, courts often do not consider the likely impact of this move (the custody transfer, which separates the child from its primary caretaker) when they deny permission to a custodial parent to change the child's residence. Nor do they take into account the Field Code's clear starting point: most moves do not entail harms sufficient to justify judicial intervention.

At a minimum, when a noncustodial parent raises the issue, a proper test must evaluate the pros and cons of the contested relocation, including direct impacts on the child's physical, educational, and emotional circumstances as well as indirect effects on the child from changes in the custodial parent's personal, financial or professional well-being. Only if this initial assessment reveals prejudice—a substantial, cognizable net harm to the child distinct from the normal difficulties that attend a move—should the court turn to an evaluation of the relative costs and benefits to the child if the move is restrained.

The Constitution does not permit a court to restrict the custodial parent's travel.⁵² In practice, then, a restraint on the child's relocation can only occur through an order transferring custody to the "stay-behind" nonprimary caretaker. In California, courts have typically ordered such a custody transfer to take place only if the primary care-

52. *In re Marriage of Fingert*, 271 Cal. Rptr. 389 (Cal. Ct. App. 1990), *review den'd* Sept. 26, 1990, 1990 Cal. LEXIS 4481; Bodenheimer articles, *supra* note 30.

taker goes through with the move. Often these orders are totally disingenuous, being entered when there is simply no basis for believing that the noncustodial parent is, in fact, the better person to provide primary care for the children.

The flaw in these orders for contingent custody transfers is most patent when a noncustodial parent, who has been under a restricted or supervised visitation order prior to the relocation litigation, is awarded custody because of a fit custodian's relocation. If the court seriously considered the implications of granting primary caretaker status to these parents, it could hardly support its decision to deny the move.⁵³ But even in less dramatic cases, it seems clear that most children will be seriously harmed by a custody transfer that dramatically decreases contact with the parent who is moving away—the person who until now has been the primary caregiver.

What is really occurring in these cases is a kind of unseemly judicial blackmail. Courts that enter contingent custody-transfer orders fully expect the custodial parent to forgo relocation in order to retain custody, sometimes speaking off the record about “calling the custodial parent's bluff.” Although these judges may honestly think they are advancing the child's interests by forcing the custodial parent to sacrifice his or her own goals so that the child will have maximum access to both parents, none of their inquiries measures the harm to the custodial parent and, derivatively, to the child of a parent's decision to abandon the move.⁵⁴ Leading divorce researcher Dr. Judith Wallerstein has expressed serious misgivings about the consequences to children if their primary custodians must live under these conditions.⁵⁵

53. See, e.g., *Custody Abuse*, 15 CALIF. LAW. 20, 20 (Mar. 1995) (describing a court's transfer of custody to a father who had previously been under a supervised visitation order).

54. This is in contrast to British case law, which considers “the likely effect on the family if leave is not given to depart.” Gillian Douglas, *Comment on Re B (Minors) (Removal from Jurisdiction)*, 24 FAM. LAW 11, 12 (1994) (summarizing the British authorities).

55. Letter from Judith S. Wallerstein, *supra* note 3, at 2:

. . . I want to emphasize again the instability in the divorced family and the need to protect the core relationship between the custodial parent and the child and at the same time enable the parent to reconstruct his or her life. . . . In speaking with custodial parents who, in order to maintain custody of the child, have given up what they regarded as an opportunity of a lifetime . . . I have found them to be distraught and depressed after the decision to remain. Those who have left [without their children] have been in mourning. I cannot see how this promotes the interests of the child.

See also additional language from this letter set forth in note 3 *supra*; Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 304 (1996).

This, then, is the nub of the problem. No custody modification can legitimately be ordered, even conditionally, unless it serves the child's best interest. This requires an assessment of the likely disadvantages to the child of changing custodial parents (a change in both location and the primary relationship) or of remaining with a parent who has had to sacrifice otherwise-legitimate aspirations in order to retain custody.⁵⁶ That assessment is simply not being made in contemporary relocation litigation.

1. THE IMPORTANCE OF STABILITY IN THE CHILD'S PRIMARY CUSTODIAL RELATIONSHIP

The research literature does not substantiate courts' assumptions or assertions that maximizing the noncustodial parent's time with the child is necessary to preserve that parent's influence and the child's welfare. To the contrary, as research reveals, the quality of the noncustodial parent's parent-child relationship is not a function of duration or frequency of visits.⁵⁷ More importantly, neither increased duration nor frequency of visits has a measurable favorable effect on the child's emotional well-being, at least so far as anyone has been able to ascertain thus far.⁵⁸ A negative correlation has, however, been clearly established. Published studies by Dr. Janet Johnston reveal that where there

56. Letter, *supra* note 55, at 2-3.

57. See, e.g., Judith S. Wallerstein, *Children of Divorce: Report of a Ten-Year Follow-Up of Early Latency-Age Children*, 57 AMER. J. ORTHOPSYCHIAT. 199, 208 (1987) ("Frequency of visiting was unrelated to the level of psychological functioning in boys or girls. But the quality of the father-child relationship was significantly related to good or poor psychological outcome among boys, although not among girls.").

58. See, e.g., Judith S. Wallerstein & Shauna B. Corbin, *Daughters of Divorce: Report From a Ten-Year Follow-Up*, 59 AMER. J. ORTHOPSYCHIAT. 593, 601 (1989) ("Contrary to the findings of this study's five-year follow up, frequency of contact between fathers and their children did not predict long-term outcome, nor did any other dimension of visiting, such as the pattern, duration, or reliability of contact."); ROBERT E. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT 102-03 (1988):

What family processes predict children's adjustment? A handful of factors stand out: the passage of time, the quality of children's relationships with their residential parents, parental conflict, and the economic standing of children's residential family. Equally important are factors for which predictive evidence is not strong: the long-term effects of the separation itself, the child's age, the amount of contact with the residential [sic] parent, and, for girls, remarriage. . . . Policies should be encouraged if they: (1) help to define a clear and relatively quick ending to the separation phase of divorce, (2) support the relationship between children and their residential parents, [and] (3) secondarily, encourage contact between children and their nonresidential parents

See also FURSTENBERG & CHERLIN, *supra* note 3, at 107-08 ("Although most observers, ourselves included, have believed that continued contact makes a difference in

is high conflict or domestic violence between the parents, children deteriorate dramatically when there are frequent visitation transfers.⁵⁹ Despite this finding, many trial courts have treated small children with great insensitivity.⁶⁰ In one case, for example, a toddler was shuttled from northern to southern California between warring parents every few days.⁶¹

While scholars find certain aspects of these findings puzzling,⁶² there is a broad consensus that the central importance of the primary relationship has been convincingly demonstrated, while no similar support has been found for the visiting relationship. Professors Frank Furstenberg and Andrew Cherlin, two noted family sociologists,⁶³ used large-scale national data to assess post-divorce problems. Their conclusions and the implications for relocation decisions are contained in their book, *Divided Families: What Happens to Children When Parents Part*.⁶⁴ because children's welfare strongly depends on the welfare of the primary custodian and data do not establish a comparable link between visitation and the child's well-being, conflict between the needs of the

children's adjustment, the evidence in support of that assertion is mixed at best. . . . Moreover, there are hints that increased contact with the outside parent or joint living arrangements can prolong or even generate conflict between quarrelsome ex-spouses.''); Marsha Kline et al., *Children's Adjustment in Joint and Sole Physical Custody Families*, 23 DEVELOPMENTAL PSYCHOLOGY 430 (1989) (reporting no evidence that joint physical custody arrangements are different from sole physical custody arrangements with regard to postdivorce child adjustment).

59. See, e.g., Janet R. Johnston, *High Conflict Divorce*, 4 FUTURE OF CHILDREN 165, 174 (1994) (summarizing Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AMER. J. ORTHOPSYCHIAT. 576 (1989)):

[A]s a group, children who had more shared access to both parents in joint custody arrangements and those who had more frequent visitation with a noncustodial [parent] in sole custody situations were more emotionally and behaviorally disturbed. Specifically, they were more depressed, withdrawn, and/or uncommunicative, had more somatic symptoms, and tended to be more aggressive.

See also notes 76 & 156 *infra*.

60. Professors Maccoby and Mnookin report, "Our most disturbing finding with respect to legal conflict [in two California counties] concerns the frequency with which joint physical custody decrees are being used by high-conflict families to resolve disputes." MACCOBY & MNOOKIN, *supra* note 2, at 273.

61. Letter brief from Tony J. Tanke, Esq. to Malcolm M. Lucas, Chief Justice of California, in support of petition for review in *Marriage of Burgess*, [California Supreme Court] No. SO46116, at 4-5 (June 2, 1995) (describing *In re Black*, Alameda Co. Superior Ct.). This case is not atypical. See *supra* note 60.

62. See, e.g., FURSTENBERG & CHERLIN, *supra* note 3, at 72-73.

63. Professors Furstenberg and Cherlin are the co-editors of a series on family policy for Harvard University Press.

64. FURSTENBERG & CHERLIN, *supra* note 3.

primary caretaker and visitation should be decided in a way that supports the custodial parent's life choices, including relocation.⁶⁵ Psychology professor Eleanor Maccoby and law professor Robert Mnookin came to a similar conclusion in their recent book concerning custody litigation in two San Francisco Bay Area counties; in *Dividing the Child* they endorse permitting relocation, even at the price of rescheduling or reducing visitation.⁶⁶ The recent work of sociologist Valarie King reports her own findings as well as those of others that again fail to find a correlation between visitation and a child's emotional welfare.⁶⁷

Children surely love both parents and are seriously pained when access to one parent is impaired. Indeed, children idealize absent, even abandoning, parents,⁶⁸ giving these parents perhaps more influence than others would think justified. But none of this negates the importance of protecting and supporting the quality of life in the place where the child primarily resides.

In other contexts, stability is readily understood to mean stability within the household, not stability of geographic location. Intact families who move for whatever reason (and who are also protected by the traditional Field Code rule) would surely not be threatened by a loss of their children's custody to family members who might think the relocation unwise and would wish to retain the children in local schools, youth groups, or therapy sessions. Although a child might be deeply saddened by increased distance from playmates, teachers, or extended family members, the child's household unit is protected.

65. *Id.* at 107-08:

The [rank] order of [the principles we have distilled from our work] will be central to our argument because [they] can have conflicting implications. When that occurs, we will take support for the custodial parent and reduction in parental conflict as the primary goals, even if that means a reduction in contact with the noncustodial parent.

66. MACCOBY & MNOOKIN, *supra* note 2, at 295: "We believe that both parents should have the right to reorganize their lives, through remarriage and the pursuit of career opportunities, even if this entails moving some distance from the former partner." They also note, "[M]odifications and changes seem particularly common for those families who choose to adopt joint custodial arrangements or where the children reside primarily with the father. These families in particular should be prepared to deal with change." *Id.* at 292.

67. Valarie King, *Nonresident Father Involvement and Child Well-Being: Can Dads Make a Difference?*, 15 J. FAM. ISSUES 78 (1994).

68. JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* 243-44 (1989) (indicating that "double imaging" occurs, in which children see reality but do not draw the negative conclusions an objective observer would).

This is precisely the crux of legal doctrines that protect natural parents above all others⁶⁹ and residential stepparents against strangers.⁷⁰ There, as under the traditional relocation rule, the burden of showing detriment or prejudice to the child must be borne by a nonhousehold member who challenges the care by those who share the child's home. That it is a noncustodial parent rather than a member of the extended family who wishes to contest the child's departure in contemporary current move-away cases does not change the equation in a dispositive fashion.

Once parental separation is at hand, the family constellation must adapt. An initial custody decision between parents is, of course, handled with the best interest standard. But once made, whether consensually or by court order, a new family unit results that deserves protection for many of the same reasons that parents are protected from strangers in other contexts.⁷¹ The literature reveals that children's well-being is strongly—essentially—affected by what happens in the primary household.

Indeed, the social science literature and California law, as embodied in California Supreme Court case law and the relocation statute, converge in emphasizing the primary caretaker relationship (rather than geography or visitation) in custody decisions.

2. CONTEMPORARY APPLICATION OF THE TRADITIONAL RELOCATION RULE

How the traditional relocation standard should apply to contemporary relocation cases, however, requires clarification. Who, for example, is a parent "entitled to the custody of a child" under current practice? And what considerations should guide a court in determining whether a challenged relocation "prejudices the rights or welfare of the child?"

69. See, e.g., CAL. FAM. CODE §§ 3040, 3041 (West 1994).

70. See, e.g., *id.* § 3040(a)(2).

71. Parties often argue that a primary caretaker who wishes to relocate suffers from mental illness such that the child's welfare will be endangered if it is removed from the intervention of the other (assertedly healthier) parent or a therapist. This argument is a cloaked effort to relitigate the initial custody decision and cannot legitimately be used to shape relocation law. The law must proceed instead on the assumption that the initial custody decision was based upon the child's best interest; if relevant mental illness was involved at that time, the decision must be deemed to have placed the child with the healthier of the parents. The mental health of this custodial parent becomes relevant to a modification proceeding, then, only if it has altered sufficiently since the initial order to constitute changed circumstances. This question must stand or fall on its own merits, not on the fact that a relocation is at hand. Similarly, a move should not be refused simply because it would require that a child change therapists. Despite their value, therapists, like teachers and doctors, are often replaced at the instance of the professional or the family even if the child never moves. There are many common, legitimate reasons for seeking new sources of professional support for the child, of which relocation is one.

a. The Person Entitled to Custody

Although the Field Code was drafted many years before contemporary concepts of joint legal and joint physical custody developed, the custody rights to which it refers are surprisingly similar to those currently prescribed by California's Family Code.⁷² There were rules that usually deferred to the father's control over custody decisions during an ongoing marriage and that provided rebuttable presumptions in favor of maternal custody for young children and paternal custody for older children, but (as today) the ultimate test in a custody contest between parents was the best interest of the child. Also as today, even cohabiting married parents were permitted to seek a sole custody order, and married parents who lived apart were equally entitled to the custody of their children unless an agreement or court order provided otherwise.

For the purposes of the relocation section, the parent entitled to the custody of a child must be the person who is primarily responsible for the child's day-to-day care. This is what custody signified in the context of custody disputes at the time that the Field Code was drafted and its language became a part of California law. It is also the relationship that current knowledge concerning children's welfare indicates deserves protection.

If one parent is designated by parental agreement or court order as the person who is primarily responsible for the child's day-to-day care, that designation should presumptively entitle the parent to the protections the relocation section provides to custodial parents.⁷³ For cases in which no custody order is in place or in which it is demonstrated that the parties have deviated from the caretaking provisions of their order, schedule, or agreement, the parent who has the primary physical care of a child fulfills the custodial role for the purposes of the statute.

72. Some provisions have not been amended since the Civil Code was first adopted in 1872, while others have been amended only to make them gender neutral or for stylistic reasons. Compare, e.g., 1 CAL. CIV. CODE, *supra* note 22, §§ 196-200, with CAL. FAM. CODE §§ 3010, 3120 (West 1994).

73. This definition would include a parent who has sole physical custody (as defined in CAL. FAM. CODE § 3007 (West 1994)), a parent with joint physical custody or joint legal custody who has been designated the primary caretaker (*id.* § 3086), and a parent who has the primary physical care of the child according to the time or parenting schedule in a case in which joint physical custody has been ordered, but no primary caretaker has been designated. See generally *id.* § 3084 ("In making an order of joint physical custody, the court shall specify the rights of each parent to physical control of the child in sufficient detail to enable a parent deprived of that control to implement laws for relief of child snatching and kidnapping.'). The definition would not apply, accordingly, to parents who are exercising substantially equal periods of physical custody (that is, in which each parent's actual caregiving is within a few percentage points of the other's share). See *infra* note 81 for a discussion of cases that do not employ traditional custody terminology.

These workable standards, which reflect the actual caretaking roles of the parents, are consistent with contemporary custody definitions, which ensure that legal custody orders do not displace physical custody arrangements when the child's location is at issue.⁷⁴

b. Ascertaining Prejudice to the Child

An interdisciplinary group of scholars recently drafted the following nine research and policy-based guidelines to assist courts in evaluating relocation disputes:⁷⁵

- (1) A child's abilities to form healthy relationships and to adapt to change depend on a healthy primary relationship and are, accordingly, endangered if that relationship is disrupted.
- (2) It is in the best interest of children in all but unusual cases to maintain contact with both parents when the parents do not live together.
- (3) Research indicates that a child's healthy psychological adjustment depends on the quality of the attachment between the child and its non-custodial parent, but is not related to the particular visitation pattern or the frequency or length of visits.
- (4) It is normal, healthy and desirable for parents whose relationship has ended to build separate lives.
- (5) These separate lives can be expected to include changes such as increased reliance on extended family relationships, the creation of new personal and family relationships, and new educational and career choices, any of which may involve relocation.
- (6) When a parent who is a child's primary caretaker chooses to relocate for such substantial reasons, it is the public policy of this state to maintain the child in its primary relationship.
- (7) It is against the public policy of this state to require a custodial parent to choose between custody of the child and a committed new personal rela-

74. See, e.g., CAL. FAM. CODE § 3083 (West 1994) ("An order of joint legal custody shall not be construed to permit an action that is inconsistent with the physical custody order unless the action is expressly authorized by the court.").

75. Carol S. Bruch, et al., Draft Research and Policy Bases for Relocation Cases (unpublished 1993). This effort was prompted by a request from California State Senator Bill Lockyer that Professor Bruch attempt to draft desirable presumptions and burdens of proof that would improve California's statutory relocation law. Professor Bruch's consultations with colleagues concerning sound substantive goals resulted instead in these jointly authored recommendations to supplement, but not replace, the Field Code language. Her co-authors were James Cramer, Ph.D. (Associate Professor of Sociology at the University of California, Davis), Blake Keasey, Ph.D. (forensic child psychologist and Clinical Professor of Psychiatry at the University of California, Davis), Carol Rodning, Ph.D. (Associate Professor of Human Development and Family Studies and Director of the Center for Child and Family Studies at the University of California, Davis), and Judith Wallerstein, Ph.D. (psychologist, researcher on the effects of divorce on children, and Founding Director, Center for Families in Transition, Corte Madera, California).

tionship, the parenting of other children, the support of friends or family, or educational or career opportunities.

(8) Except in cases of serious or continuing domestic violence or emotional abuse, however, it is also against the public policy of this state for a primary caretaker to relocate with the child for insubstantial reasons or with the intention of disrupting the child's relationship with the other parent.⁷⁶

(9) It is also against the public policy of this state, except in unusual circumstances, to order the relocation of child during the last two years of high school if the child strongly prefers to remain in a school and community in which the child is established.⁷⁷

Some of these recommendations are based on the research literature, while others express the members' professional expertise, their shared policy judgments, or their appraisal of legislative realities. As a consequence, the document contains an important inconsistency in its eighth paragraph, which implies that relocation should be refused if a parent wishes to disrupt the child's relationship with the other parent or has "insubstantial" reasons for wanting to move. Given the importance of maintaining the custodial household unless the child's welfare will be advanced by a custody transfer, and viewed strictly from the child's vantage point, it seems clear that a parent's motives for moving are generally irrelevant. Just as people marry, divorce, attend school or change jobs for reasons that others might question, they may choose to move for idiosyncratic reasons. From the child's perspective, the question remains: if the parents are to live further apart, with which parent should the child spend most of its time? Just as the question remains the same, so does the answer: the child should reside with the person who has been providing its primary care unless, for demonstrable reasons, its welfare will be harmed so substantially that a custody

76. In view of the mental health literature cited above, this formulation is probably too narrow. First, there is reason for concern about the child's welfare if there are frequent custody transfers in any case of high interparental conflict, whether or not that conflict is fairly termed abuse. See, e.g., *supra* notes 58-61 and accompanying text, *infra* note 156 and accompanying text. This issue has been specifically addressed by the MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 403 (National Council of Juvenile and Family Court Judges 1994) ("[I]t is in the best interest of the child to reside with the parent who is not a perpetrator of domestic or family violence in the location of that parent's choice, within or outside the state."). Second, for the reasons discussed *infra* in the text following note 77, a legal inquiry into parental motives improperly diverts the court's attention from children's interests and inappropriately encourages decisions that punish custodial parents' life choices at children's expense.

77. This somewhat unusual formulation was prompted by Dr. Wallerstein's experience with court orders that pay insufficient attention to the distinctive circumstances of older teenagers who fervently wish to remain in their current locale to complete secondary school even if this entails changing custodial households.

transfer is required. Punishment of even a selfish or foolish parent by removing the custody of a child who is not endangered is counterproductive for the child.

In the context of relocation, the child will rarely be endangered in any demonstrable, significant fashion, and equally rarely will removal from the primary caregiver's care alleviate the perceived dangers. Rather, a change in custody will inevitably replace the harm of increased distance from the noncustodial parent with increased distance from the custodial parent—usually an even more harmful result. Education may be effective in convincing parents to cooperate in facilitating a child's access to both parents' influence and care, and enforcement measures are available to ensure that access continues following a move. Punitive custody transfers based on inter-parental concerns, in contrast, cannot provide sensible results for children whose parents' lives diverge. Although this conclusion may be intuitively obvious only when domestic hostility or violence is present, it is also the logically inescapable result of a child-centered inquiry in less dramatic cases.

With these important caveats, the above list of principles can assist in a contemporary application of the traditional relocation rule that is also faithful to its historical roots: a strong yet rebuttable presumption that remaining with the primary caregiver, even when that entails relocation, serves the child's welfare.

If, in light of these considerations, a relocation is authorized, how might a court make appropriate adjustments in visitation or time shares and support orders affecting the child? Creativity is sorely needed, as little in the reported cases speaks to the considerations that should shape these decisions. At a minimum, they should include the means (such as telephone, mail, fax, and e-mail contact, visits by the child to the noncustodial parent, and visits by the noncustodial parent to the child) by which a relationship between the child and noncustodial parent can be maintained; the developmental stage of the child as it affects travel possibilities and the length of visits away from the child's primary residence or primary caretaker; and the child's needs and schedule as they affect the child's contact with siblings,⁷⁸ stepparents, members of the extended families, and participation in important peer and school activities. These psychological considerations should be supplemented by an appropriate allocation of costs and travel burdens associated with

78. Siblings should be broadly defined for these purposes to include other children who are part of the child's family life, including, for example, half-siblings, step-siblings, and long-term foster children.

maintaining contact, given the parties' respective financial resources and their other caretaking, educational, or career obligations.⁷⁹

III. Supreme Court Relocation Decisions from Other States

The following review reveals the extent to which the forces that have shaped California relocation law have also affected the jurisprudence of sister-state supreme courts. It focuses on decisions rendered by these courts since 1985⁸⁰ in which the parent seeking to relocate was either a sole custodian or was formally designated as the parent with primary physical custody. Because a primary or sole custodian is denominated in the vast majority of cases, even those in which joint legal or joint physical custody is ordered,⁸¹ this search reflects the law as it has been enunciated for them. Although some joint custody cases therefore appear here, this discussion does not canvas earlier state supreme court case law or post-1985 cases involving joint physical custody orders in which no primary custodian was designated or cases involving idiosyncratic statutory provisions.⁸² Nor does it present the case law of states in which considerable

79. Punitive orders, in contrast, should constitute reversible error. *See also infra* notes 98-104 and accompanying text.

80. *See generally* Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 J. FAM. L. 791 (1993). For a thorough survey and discussion of pre-1985 case and statutory law, *see* Anne L. Spitzer, *Moving and Storage of Postdivorce Children: Relocation, The Constitution and The Courts*, 1985 ARIZ. ST. L.J. 1.

81. MACCOBY & MNOOKIN, *supra* note 2, at 268-70. Because changing terminology and efforts by judges, counsel or the parties to avoid custody terminology may obscure the relevant inquiry (which parent provides the primary care) and has led to problems at the trial and appellate levels, this article recommends defining the custodial parent for the purposes of relocation law according to any designation that reflects the primary relationship. California practice, for example, has recently begun to use "time shares" or "parenting plans" in cases that are denominated "joint physical custody," without necessarily designating the primary custodial parent. *Compare In re Marriage of Birnbaum*, 260 Cal. Rptr. 210, 213 (Cal. Ct. App. 1989) (holding that a trial court's order changing the primary household in a joint physical custody case was "at most" a change in the residential arrangement, not a change in custody that would require a showing of changed circumstances) with *In re Marriage of Fingert*, 271 Cal. Rptr. 389, 391 (Cal. Ct. App. 1990) ("We do not choose to chastise parents who fail to make mutually agreeable coparenting residential arrangements by suggesting that by such failure, they will have to accept whatever decision a trial court decides. We shall adhere to the standard of review announced by the Supreme Court.").

82. Professor Spitzer summarizes her 1985 review of the statutory law:

Several states have statutes that automatically restrict the movement of the custodial parent upon divorce. The existence of a statute is, however, not necessarily an indication that it is more difficult for a custodial parent to leave the state than it would be in a state without a statute.

Spitzer, *supra* note 80, at 35 (citation omitted).

activity has occurred in the lower courts, but no decision exists from the state's highest court. In general, the pattern revealed by this review, as exemplified by Florida,⁸³ has been that trial and intermediate courts have often imposed travel constraints, but that state supreme courts, once they have addressed the matter, have provided presumptions favoring the custodial household's ability to relocate.

A. *Statutes with Language Identical to California Family Code § 7501*

Two sister state supreme courts, those of South Dakota and Montana, have recently decided cases involving statutory provisions virtually identical to California's section 7501 that also trace to the Field Code.⁸⁴

1. SOUTH DAKOTA

The South Dakota Supreme Court has interpreted its state's language as creating a presumption that the custodial parent has a right to remove a minor child's residence out of the state unless the noncustodial parent can show the move is not in the minor child's best interest.

In *Fortin v. Fortin*,⁸⁵ a noncustodial parent sought to restrain an out-of-state move. The parties had agreed that the mother would have custody of their five-year-old son, subject to the father's rights of (unspecified) reasonable visitation. Later, following their divorce, when the mother notified the father of her intention to move to Ohio to remarry and to live with her new husband who was employed there, the father sought a restraining order to prevent her from relocating the child. Concluding that the trial court had prohibited the relocation for the sole reason that the move would disrupt the noncustodial father's visitation with, and influence over, his son, the state supreme court found an abuse of discretion and reversed, allowing the proposed relocation.

The court began its analysis by quoting South Dakota's statutory provision, which states, "A parent entitled to the custody of a child has the right to change his residence, subject to the power of the circuit court to restrain a removal which would prejudice the rights or welfare of the child."⁸⁶ Interpreting this language, the court said that removal should generally be permitted so long as the custodial parent has a good reason for living in another state and the move is consistent with the best interest of the child.⁸⁷ The court emphasized that a new family

83. See *infra* notes 105-06 and accompanying text.

84. See *supra* note 20 and accompanying text, discussing the history.

85. 500 N.W.2d 229 (S.D. 1993).

86. S.D. CODIFIED LAWS ANN. § 25-5-13 (1992).

87. 500 N.W.2d at 231. This interpretation is consistent, of course, with the language of *Wood*, set forth in the text accompanying note 23 *supra*.

unit consisting of the children and the custodial parent is formed after divorce and that the children's best interest is closely related to the best interest of the custodial family unit. Only in the context of what is best for this custodial family unit should changes in the nature and terms of visitation for the noncustodial parent be considered.⁸⁸

In providing further guidance to the state's lower courts, the South Dakota Supreme Court echoed the concerns of other courts and commentators for appropriate protection of the custodial family unit: opportunities for a better and more comfortable life style for the custodial family unit should not be sacrificed to maintain weekly visitation by the noncustodial parent where reasonable alternative visitation is available. Less frequent visits of longer duration are a reasonable alternative. Noncustodial parents are free to leave the jurisdiction to seek opportunities for a better or different life style for themselves even though their children continue to reside in the jurisdiction.⁸⁹ Custodial parents, who bear the essential burden and responsibility for the children, are entitled to the same option that noncustodial parents or intact couples enjoy to seek a better life for themselves and their children. Like the mental health sources cited above, the court concluded that when they are in conflict, the best interest of the children and their new family unit must prevail over a noncustodial parent's visitation privileges.⁹⁰

More recently, the court was called upon to apply these principles in *Fossum v. Fossum*,⁹¹ where the noncustodial parent sought a change of custody rather than a restraining order to prevent the children's relocation. The court indicated that, as a general rule, insignificant geographical changes would not constitute a substantial change in circumstances sufficient to reopen an existing custody determination. It reversed the lower court, concluding that the mother's 70-mile move in this case was an insignificant change of circumstances. The court's opinion discounted the relevance of natural consequences of any move, such as changes to a new home, new school and new friends, and the lack of daily contact with the noncustodial parent. Rather, the analysis emphasized the parenting attributes that had made the mother the better choice as the custodial parent initially, noting that they did not change with a change in geography.

88. *Id.* at 232.

89. For arguments to the same effect by the late Professor Brigitte Bodenheimer, the original Reporter of the Uniform Child Custody Jurisdiction Act, see the articles cited *supra* note 30.

90. 500 N.W.2d at 232-33. See *supra* notes 58-66 and accompanying text.

91. 545 N.W.2d 828 (S.D. 1996).

2. MONTANA

The Supreme Court of Montana has also interpreted its statutory counterpart to California Family Code § 7501⁹² as creating a presumption that the custodial parent may move out of state with the child.⁹³ This statutory entitlement has been held to apply to the parent entrusted with primary physical custody of a child in a joint legal custody situation as well as to a sole physical custodian.⁹⁴

It is particularly noteworthy that Montana's presumption that the custodial parent may relocate with the child exists side by side with an express legislative statement that "it is the public policy of this state to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage"⁹⁵ Even in light of this "frequent and continuing contact" policy, the Montana Supreme Court indicated that the burden is on the party seeking to modify primary custody in removal cases.⁹⁶ Indeed, the Montana Supreme Court has protected the continuity of children's primary custody in a long line of relocation cases.⁹⁷

In a puzzling recent departure from these precedents, however, in *In re Marriage of Elser*,⁹⁸ the court focused exclusively on the disruption of the father's visitation that would result if the custodial mother were allowed to remove the couple's children from the state so that she could further her education. Although she planned to move only because she had been refused enrollment in a local training program, the court did not address this issue. Instead it reasoned that allowing

92. MONT. CODE ANN. § 40-6-231 (1993). This statute, too, traces to the Field Code. See *supra* note 20.

93. *Lorenz v. Lorenz*, 788 P.2d 328, 331 (Mont. 1990) ("This court has recognized that a custodial parent is presumptively entitled to change her own and the child's residence."); *In re Marriage of Paradis*, 689 P.2d 1263, 1265 (Mont. 1984) ("Deanne was presumptively entitled to move with Matthew and to settle in a new home."). In an original custody proceeding, there is no presumption either way. A parent's relocation is a factor for the court to consider in determining which parent should be designated as the primary custodial parent. *In re Marriage of Hogstad*, 914 P.2d 584 (Mont. 1996) (affirming an award of primary physical custody to the mother, who planned an out-of-state move for employment reasons).

94. *In re Marriage of Johnson*, 777 P.2d 305, 307 (Mont. 1989).

95. MONT. CODE ANN. § 40-4-222 (1993).

96. In a nonremoval case, the court explained that this burden is a heavy one due to the policy of preserving "stability and continuity of custody of the children." *In re Marriage of Johnson*, 879 P.2d 689, 694 (Mont. 1994).

97. See *In re Marriage of Paradis*, 689 P.2d 1263 (Mont. 1984); *In re Marriage of Cole*, 729 P.2d 1276 (Mont. 1986); *In re Marriage of Bergner*, 722 P.2d 1141 (Mont. 1986); *In re Marriage of Johnson*, 777 P.2d 305 (Mont. 1989); *Lorenz v. Lorenz*, 788 P.2d 328 (Mont. 1990).

98. 895 P.2d 619 (Mont. 1995).

removal of the children was against their best interest because of the difficulty in scheduling visitation, given the children's school schedule and father's unusual work schedule;⁹⁹ the father performed seasonal highway construction work from April through November, working twelve to eighteen hours per day, five or six days per week. He typically arrived home from the work site early Saturday morning and left on Sunday afternoon to return to it. Because the children would be in school in Kansas during the winter months when his work was slow, they would not be able to have their usual scheduled two-month visitation then. During the summer months when they were out of school and could come to Montana for an extended visit, spending time with them "would be meaningless to [the father] because of his work schedule."¹⁰⁰

As a solution to father's visitation problems, the court awarded him primary custody during the school year if the mother moved outside of Montana and gave her visitation for two months during the summer; it did not even mention the possibility that the father could have spent his off-months, or at least some extended period during the winter, in Kansas, where the children would have been. Because of custom, which requires that the children come to him rather than the converse, this solution may not have occurred to anyone.¹⁰¹ This article's recommendations for determining revised visitation schedules, in contrast, would have raised this option expressly, placing it before the parties and the court.¹⁰²

The *Elser* court could not reasonably have believed that a father who could not adequately parent the children during the proposed two months of summer visitation (because it fell during his work season) could nevertheless be the best primary custodian for six months of this eight month season. Its goal appears to have been to coerce the mother, through threatened loss of custody of her children, into abandoning her career plans and remaining in Montana so that the father could

99. *Id.* at 622-23.

100. *Id.* at 623.

101. Indeed, the same can be said of California's *Burgess* case, described in note 41 *supra*. In contrast to *In re Marriage of Selzer*, 34 Cal. Rptr. 2d 824 (Cal. Ct. App. 1994) (relocation one-hour away by car within state), where the appellate court noted the disparate impacts of commute burdens on the child's life, the *Burgess* court did not consider the possibility that the father, if he wished to remain involved in his children's daily schedules, had the choice of moving forty miles to their new location. This would have placed the commute burden on him, the person with more available time, instead of on the custodial parent, whose commute burdens would detract from the children's daily lives.

102. See *supra*, text following note 77.

continue his existing, convenient visitation schedule.¹⁰³ Supreme courts in other states have spoken out against this practice.¹⁰⁴

B. Statutes Directing Frequent and Continuing Contact

At least five state supreme courts in addition to Montana's have decided relocation cases in light of their states' "frequent and continuing contact" policies.

1. FLORIDA

In *Mize v. Mize*, the Florida Supreme Court adopted a presumption that the custodial parent can relocate outside of the state with the children.¹⁰⁵ The Florida Supreme Court was called upon to resolve a long and sharp conflict among the state's appellate courts regarding the proper standard for deciding relocation disputes.

It began its discussion by recognizing the policy of its statute that seeks to assure that children have "frequent and continuing contact" with both parents and that parental responsibility for children be shared after divorce.¹⁰⁶ Emphasizing that the welfare of post-divorce children is closely related to the welfare of their custodial parents, however, the court eschewed the state's appellate court cases that focused solely on noncustodial parents' visitation rights. It chose instead to adopt the reasoning and policies of the appellate cases which established a presumption that custodial parents could relocate without losing custody of their children.

2. VERMONT

In 1992 the Supreme Court of Vermont adopted a relocation standard which assumes that the custodial parent will relocate and asks whether the child would be better off with the custodial parent in the new location or the noncustodial parent in the old location.¹⁰⁷ The noncustodial father

103. Alternatively, it may have been intended to punish her for her efforts. See Bodenheimer, 65 CALIF. L. REV., *supra* note 30 (a criticism of such "punitive decrees" by the original Reporter of the Uniform Child Custody Jurisdiction Act).

104. See Lane v. Schenck, 158 Vt. 489, 614 A.2d 786, 792 (Vermont 1992); Taylor v. Taylor, 849 S.W.2d 319, 321 (Tenn. 1993); Harder v. Harder, 524 N.W.2d 325, 329 (Neb. 1994).

105. *Mize*, 621 So. 2d 417 (Fla. 1993). This presumption was confirmed recently in *Russenberger v. Russenberger*, 669 So. 2d 1044 (Fla. 1996). After strongly restating the presumption, the *Russenberger* court affirmed the lower court's finding that the noncustodial father had successfully rebutted the presumption by raising sufficient doubt as to the mother's good faith motivation for the move, her compliance with visitation, and the adequacy of the substitute visitation offered.

106. See FLA. STAT. ANN. § 61.13(2)(b) (West Supp. 1995).

107. Lane v. Schenck, 614 A.2d 786, 791 (Vt. 1992).

in the case had specifically questioned whether the mother's move could be reconciled with Vermont's statutory "frequent and continuing contact" policy.¹⁰⁸ The court noted that the role of custodial parent had been assigned to the mother in this case at divorce and that the custodial role included deciding questions central to the tasks of child rearing. Among these child-rearing issues was where the custodial family unit would reside. The court then concluded, "While the policy promoting visitation must be considered, concerns relating to it must not overshadow the proper role of the custodial parent."¹⁰⁹

The supreme court found that the lower court had focused on the ordinary and usual repercussions of any relocation and that its decision merely expressed its own preference. It then instructed the state's lower courts that while they might differ with custodial parents as to the wisdom of a parental decision, they should not lightly replace the custodian's judgment with their own.

In framing its standard for resolving relocation disputes, the Vermont Supreme Court addressed the "Sophie's Choice" which courts commonly present to custodial mothers in relocation cases, forcing them to choose between their children and their new husbands.¹¹⁰ Declaring that it was improper to base custody orders on mothers' expressions of their ultimate choice to forgo the benefits of the move rather than lose custody of their children, the court addressed the proper custody question, one that precludes coercing custodial parents into remaining in the jurisdiction to retain custody of their children: Would the children's best interest be better served if they were placed in father's custody in Vermont or in the mother's custody in Iowa? Indeed, because the court considered a change in custody to be a "violent dislocation" for children, the noncustodial parent in Vermont was required to prove that the children's best interest would be so undermined by a relocation with the custodial parent that a transfer of custody would be necessary.

3. CONNECTICUT

The Supreme Court of Connecticut recently decided a relocation case without directly considering what the appropriate standard of decision should be.¹¹¹ Instead, the court's opinion consisted of a point-by-point response to arguments raised by the noncustodial father, who had ap-

108. See VT. STAT. ANN. tit. 15, § 650 (1989).

109. 614 A.2d at 789-91.

110. See e.g., *Taylor v. Taylor*, 849 S.W.2d 319, 321 (Tenn. 1993) (forcing custodial mother to choose between her child and her new husband); *Harder v. Harder*, 524 N.W.2d 325, 329 (Neb. 1994) (same).

111. See *Blake v. Blake*, 541 A.2d 1201 (Conn. 1988).

pealed the trial court's granting of permission to the mother to relocate to California with the children.

He argued that permission for the mother to relocate was reversible error in view of the statutory requirement "that physical custody shall be shared by the parents in such a way as to assure the child of continuing contact with both parents."¹¹² The court pointed out that the parents had agreed only to joint legal custody and that the mother's removal with the children was not inconsistent with a grant of joint legal custody.¹¹³ It then concluded that the trial court had not abused its discretion in finding that the best interest of the children would be promoted by allowing the mother to live near her family in California, where all of the children had been born and had lived for a time, and by providing liberal rights of visitation to the father, whose financial resources were ample to enable him to exercise them.

4. ILLINOIS

Illinois is the first state reviewed here that expressly places a statutory burden of proof on the custodial parent in relocation cases:

The court may grant leave, before or after judgment, to any party having custody of any minor child or children to remove such child or children from Illinois whenever such approval is in the best interests of such child or children. *The burden of proving that such removal is in the best interests of such child or children is on the party seeking the removal.*¹¹⁴

Interpretation and application of this burden, however, has been and continues to be problematic for the Illinois courts.

The original version of Illinois' removal statute provided simply that courts could allow removal of children from the jurisdiction whenever it was in the best interest of the child.¹¹⁵ To resolve a split among the Illinois appellate courts as to how the burden of proof should be allocated under that statute, the Illinois legislature added the language italicized above to clarify that the burden of proof in removal proceedings is on the custodial parent.¹¹⁶ By the time the Illinois Supreme Court agreed to hear *In re Marriage of Eckert*,¹¹⁷ however, the appellate courts had once again split sharply in their approaches.

112. See CONN. GEN. STAT. § 46b-56a(a) (1958).

113. 541 A.2d at 1204.

114. See (Smith-Hurd Supp. 1992) (emphasis added).

115. ILL. ANN. STAT., ch. 40, para. 609 (Smith-Hurd 1980); this "best interest" rule was, of course, quite different from that provided by CAL. FAM. CODE § 7501, as explained above.

116. ILL. ANN. STAT., ch. 40, para. 609, Supplement to Historical & Practice Notes, at 65 (Smith-Hurd Supp. 1992).

117. 518 N.E. 2d 1041 (Ill. 1988).

In *Eckert*, by a divided opinion, the intermediate appellate court had applied a rule it said expressed the trend of the case law, permitting removal unless it was counter-indicated by strong facts.¹¹⁸ The supreme court disagreed, reasoning that this standard was contrary to express language of the removal statute and diluted the custodial parent's statutory burden of proof. It also noted that a trial court's examination of a removal petition should be guided by policies of the state's custody statutes. These include an expressly stated goal to "secure the maximum involvement and cooperation of both parents regarding the physical, mental, moral and emotional well-being of the children during and after the litigation."¹¹⁹ This policy was legislatively incorporated into the removal statute by placing the burden of proof as to the child's best interest on the custodial parent.

The court followed these rather anti-removal comments, however, by suggesting factors to aid the lower courts in assessing the best interest of the child. These factors were taken from the leading New Jersey case of *D'Onofrio v. D'Onofrio*,¹²⁰ which, although less protective of the custodial family than the current New Jersey case law,¹²¹ is nevertheless decidedly more solicitous than the language of the Illinois statute.¹²²

Eckert's mixed message has apparently confused the lower courts. Its factors were offered as a way to balance the custodial parent's interest in moving against the disruption of the noncustodial parent's visitation. Yet, one Illinois appellate court in a recently published relocation case expresses concern that the factors have come to be treated as overly restrictive "prongs of a test, all of which had to be met in order for the court to allow removal."¹²³ Its decision in *Eaton* suggests that courts using this approach have strayed from the intention of *Eckert's* first factor (which recognizes that the best interest of children is closely connected with the best interest of the custodial parent). The court then reversed the trial court, thereby permitting the custodial parent to relocate.¹²⁴

118. *Id.* at 1045.

119. 518 N.E.2d at 1046 (discussing Ill. Rev. Stat., ch. 40, par. 102(7) (1986)).

120. 365 A.2d 27, 29-30 (N.J. Super. 1976).

121. See *infra* notes 141-50. After *Eckert*, the New Jersey Supreme Court further strengthened that state's support of the custodial household. See *infra* notes 143-49 and accompanying text.

122. In an opinion not yet released for publication, the Illinois Supreme Court reviewed an application of these factors in *In re Marriage of Cheri Smith*, 665 N.E.2d 1209 (Ill. 1996). In a fact-specific and poorly-reasoned opinion, the court affirmed an award of sole custody to the mother at the same time that it denied her permission to move with the children to New Jersey to live with her new husband.

123. *In re Marriage of Eaton*, 646 N.E.2d 635, 640 (Ill. App. Ct. 1995).

124. *Id.* at 641, 642.

Eaton's analysis may explain why other post-Eckert appellate decisions have reversed trial court travel restrictions nine times, but only once reversed a court that had granted permission to move.¹²⁵ Even under an unfavorable burden, the Illinois appellate courts have found children's needs sufficient to justify relocation in many cases.

5. NORTH DAKOTA

Until 1979, North Dakota's relocation statute, also derived from the Field Code, was virtually identical to California Family Code § 7501. Before its amendment it was interpreted by the North Dakota Supreme Court as placing the burden on the noncustodial parent to seek a restraining order to prevent the custodial parent from moving the child out of state.¹²⁶ In contrast, the statute's current version expressly prohibits a child's removal from the state without the permission of the court or the noncustodial parent if the noncustodial parent has visitation rights that have been exercised within the preceding year.¹²⁷ This version has been read to place the burden on the custodial parent to demonstrate that the proposed move is in the child's best interest.¹²⁸

How the child's best interest has been viewed in North Dakota relocation cases has nevertheless undergone a significant transformation since the restrictive statutory amendment was adopted. An early focus on protecting visitation rights¹²⁹ has given way to a more recent and very strong emphasis on protecting custodial stability and continuity.

125. See reversals of denials in *In re Marriage of Samarripa-Gesundheit*, 529 N.E.2d 780 (Ill. App. Ct. 1988); *In re Marriage of Taylor*, 559 N.E.2d 1150 (Ill. App. Ct. 1990); *In re Marriage of Miroballi*, 589 N.E.2d 565 (Ill. App. Ct. 1991); *In re Marriage of Good*, 566 N.E.2d 1001 (Ill. App. Ct. 1991); *In re Marriage of Roppo*, 587 N.E.2d 1031 (Ill. App. Ct. 1992); *In re Marriage of Pribble*, 607 N.E.2d 349 (Ill. App. Ct. 1993); *In re Marriage of Young*, 636 N.E.2d 1092 (Ill. App. Ct. 1994); *In re Marriage of Wycoff*, 639 N.E.2d 897 (Ill. App. Ct. 1994); *In re Marriage of Eaton*, 646 N.E.2d 635 (Ill. App. Ct. 1995); and a reversal of permission in *In re Marriage of Kutinac*, 538 N.E.2d 862 (Ill. App. Ct. 1989).

126. *Burich v. Burich*, 314 N.W.2d 82, 84 (N.D. 1981); this is, of course, the party who bears the burden under this article's reading of California Family Code § 7501.

127. N.D. CENT. CODE § 14-09-07 (1991).

128. *Burich v. Burich*, 314 N.W.2d 82, 84-85 (N.D. 1981); *Olson v. Olson*, 361 N.W.2d 249, 252 (N.D. 1985); *Novak v. Novak*, 441 N.W.2d 656 (N.D. 1989).

129. See, e.g., *McRae v. Carbo*, 404 N.W.2d 508 (N.D. 1987), where the state supreme court emphasized the role of visitation as it denied the custodial mother permission to relocate to Washington State with her child. It noted the state's "legally recognizable right of visitation between a child and the noncustodial parent which is considered to be in the best interests of the child" and emphasized the high level of importance the legislature and prior case law had placed on "frequent and continuing contact" with both parents after divorce. *Id.* at 509-10. The fact that the move would make the father's weekly visitation schedule impractical was the only negative factor mentioned in the opinion that denied her permission to move. She had hope to move

The court has gradually broadened its best interest inquiry, recognizing that economic benefit to a stepparent is also to the benefit of the spouse's dependent children;¹³⁰ that stability and continuity of the integrated family unit in which the child has been residing is important,¹³¹ and that, "If the court refuses to grant permission for the children to leave the state and the custodial parent leaves, the roles are reversed, but the problem is the same: The move has interfered with or restricted the ability of one parent to exercise visitation rights."¹³² In each of these more recent cases, the court affirmed orders permitting the custodial parent to relocate with the children, noting that the noncustodial parent's relationship with the children had been adequately protected by the trial court through extensive summer visitation.¹³³

The most recent stage of this transformation has been to treat relocation cases as custody modifications. As other courts have recognized, a court may not constitutionally require that a custodial parent remain in the jurisdiction and care for the child;¹³⁴ rather its power extends only to ordering that the child remain. The North Dakota Supreme Court has treated its most recent relocation cases as custody modification cases,¹³⁵ an approach that seems correct. If the custodial parent is unwilling or unable to stay, the decision denying permission to relocate the child necessarily effects a change of custody.

In *Gould v. Miller*,¹³⁶ the North Dakota court employed a two-step analysis to the father's modification request. First, it said, a court must determine whether there has been a significant change in circumstances since the original custody order. If such a change has been shown, the court must next decide whether the changed circumstances compel a custodial change for the best interest of the child. Significantly, the parent seeking to modify custody has the burden of showing both that

to her parents' and sister's community, where she had been offered a job at her current salary but with more flexible working hours that would have given her more time with her child. *Id.* at 508.

130. *Hedstrom v. Berg*, 421 N.W.2d 488-90 (N.D. 1988).

131. *Novak v. Novak*, 441 N.W.2d 656, 658 (N.D. 1989).

132. *Thomas v. Thomas*, 446 N.W.2d 433, 435 (N.D. 1989) (quoting trial court findings).

133. *Hedstrom*, 421 N.W.2d at 490; *Novak*, 441 N.W.2d at 657-58; *Thomas*, 446 N.W.2d at 435.

134. *See, e.g.*, *Kerkvliet v. Kerkvliet*, 480 N.W.2d 823, 829 (Wis. Ct. App. 1992).

135. "Because a motion for change of custody and a counter-motion to change the residence of the child are inseparable and intermingled, . . . when one of the competing motions is granted, the other is effectively denied." *McDonough v. Murphy*, 539 N.W.2d 313, 318-19 (N.D. 1995); *see also Thomas v. Thomas*, 446 N.W.2d 433, 436 (N.D. 1989).

136. 488 N.W.2d 42, 43 (N.D. 1992).

a circumstance changed significantly and that this change so adversely affected the child that custody should be switched.¹³⁷

By the time the court decided the 1993 case of *Barstad v. Barstad*¹³⁸ the transformation had been fully accomplished. Lower courts were instructed that they should change custody only if necessary for the child's best interest. They were told that, although a child's best interest is to be determined in reference to statutorily prescribed factors, the process of weighing those factors must be "gauged against the backdrop of the stability of the child's relationship with the custodial parent."¹³⁹ In its most recent relocation case, the court reaffirmed the importance of custodial stability and continuity by directing that a change in custody should be made "[o]nly when the reasons for changing custody substantially outweigh the child's stability with the custodial parent."¹⁴⁰ Maintenance of custodial stability and continuity, the court observed, is a very compelling consideration. North Dakota's statute still imposes delays and financial burdens on custodial parents, who must seek permission to relocate. But the test that the court will apply has restored the respect for the custodial relationship that it provided when North Dakota's statute tracked Family Code § 7501.

C. Other Relocation Statutes

1. NEW JERSEY

With the adoption of a flexible balancing approach in *D'Onofrio v. D'Onofrio*,¹⁴¹ New Jersey became a trend setter in the area of relocation law. The New Jersey statute governing relocation provides in pertinent part:

When the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living separate, and such children are natives of this State, or have resided five years within its limits, they shall not be removed out of its jurisdiction against their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise order.¹⁴²

The court of chancery in *D'Onofrio* clarified what "cause shown" means by spelling out how the custodial parent's interest in moving

137. *Id.* at 43.

138. 499 N.W.2d 584 (N.D. 1993).

139. *Id.* at 587.

140. *McDonough v. Murphy*, 539 N.W.2d 313, 318 (N.D. 1995).

141. 365 A.2d 27 (N.J. Super. Ct. Ch. Div. 1976), *aff'd*, 365 A.2d 716 (N.J. Super. Ct. App. Div. 1976).

142. N.J. REV. STAT. ANN. § 9:2-2 (West 1993).

is to be balanced against the disruption of the noncustodial parent's visitation. This balancing, which has been adopted and refined by the New Jersey Supreme Court, gives priority to protecting the continuity of the child's relationship with the primary caretaker.

The *D'Onofrio* court's reasoning began with the premise that "children, after the parents' divorce or separation, belong to a different family unit than they did when the parents lived together."¹⁴³ The court viewed this new family unit as consisting of the custodial parent and the children and expressed the belief that what was advantageous to the new family unit was also in the best interest of the children. Where geographical proximity allowed, some variation of weekly visitation had traditionally been viewed as being most consistent with maintaining the child's relationship with the noncustodial parent, the court noted. But where the custodial parent could demonstrate a "real advantage" to the family unit from moving their residence to a place so distant as to render weekly visitation impossible, the court should weigh specific factors to determine whether to allow the removal, such as: (1) the likelihood that the prospective move would enhance the general quality of life for both the custodial parent and the children; (2) the motive of the custodial parent in seeking to move; (3) the motive of the noncustodial parent in resisting the move; and (4) whether a realistic and reasonable visitation schedule could be arranged that could provide an adequate basis for preserving and fostering the child's relationship with the noncustodial parent.

This popular balancing approach was affirmed and clarified by the New Jersey Supreme Court in *Cooper v. Cooper*,¹⁴⁴ where the court emphasized that the New Jersey balancing test involves a shifting burden. First, it is incumbent upon the parent seeking removal to establish that there is a "real advantage" to that parent in the move and that the move is not detrimental to the best interest of the children.¹⁴⁵ However, the court made clear that the advantage to the custodial parent need not be substantial. Rather, the custodial parent must demonstrate only a "sensible good faith reason for the move."¹⁴⁶ If the custodial parent establishes this threshold requirement, the burden then shifts to the parent resisting the move to demonstrate that "a proposed alternative visitation schedule would be impossible or so burdensome as to affect unreasonably and adversely his or her right to preserve his or her relationship with the child."¹⁴⁷

143. 365 A.2d at 29.

144. 491 A.2d 606 (N.J. 1984).

145. *Id.* at 613.

146. *Id.*

147. *Id.* at 614.

In its next case, the court further refined its test by shifting the focus of the noncustodial parent's burden from showing an adverse effect on his or her visitation rights to demonstrating that the proposed relocation would affect visitation in a way that would prove detrimental to the child.¹⁴⁸ If the noncustodial parent meets this burden, the trial court must then balance the competing interests of the parties. The more adversely the move would affect the noncustodial parent's visitation with the children, the stronger showing the custodial parent must make to justify it.¹⁴⁹

In oft quoted language, the *D'Onofrio* court emphasized that the new family unit should not have to forfeit the opportunity for a better and more comfortable lifestyle solely to maintain weekly visitation by the noncustodial parent. It suggested that

the alternative of uninterrupted visits of a week or more in duration several times a year, where the father is in constant and exclusive parental contact with the child and has to plan and provide for them on a daily basis, may well serve the paternal relationship better than the typical weekly visit which involves little if any exercise of real paternal responsibility.¹⁵⁰

Because of the minimal burden on the custodial parent to establish a "sincere, good faith reason for the move" and the heavy burden on the noncustodial parent to establish a "detriment to the child," the New Jersey balancing test in its current form approximates a rebuttable presumption that the custodial parent should be allowed to relocate with the children. As in North Dakota, however, the New Jersey statute nevertheless imposes a litigational burden on the custodial parent to seek judicial approval for the move if the noncustodial parent refuses to consent.

2. MASSACHUSETTS

Both the Massachusetts removal statute and its supreme court case law track those of New Jersey.¹⁵¹ In adopting the New Jersey approach, the Massachusetts Supreme Court noted that it is 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."¹⁵²

148. *Holder v. Polanski*, 544 A.2d 852, 856 (N.J. 1988).

149. *Id.* at 857.

150. 365 A.2d at 30.

151. See MASS. GEN. LAWS ANN. ch. 208, § 30 (West 1987) (containing almost identical language); *Yannas v. Frondistou-Yannas*, 481 N.E.2d 1153, 1157 (Mass. 1985) (expressly adopting the New Jersey balancing approach as its standard for determining when removal should be allowed).

152. 481 N.E.2d at 1157, quoting *Cooper v. Cooper*, 491 A.2d 606, 612 (N.J. 1984).

3. NEVADA

The Nevada Supreme Court, which interpreted that state's new removal statute for the first time in 1991, also decided to follow New Jersey's approach, but provided additional factors to guide the lower courts in determining whether a move would likely improve the quality of life for the children and the custodial parent.¹⁵³ Nevada's removal provision, added in 1987, states:

If custody has been established and the custodial parent or a parent having joint custody intends to move his residence to a place outside of this state and to take the child with him, he must as soon as possible and before the planned move, attempt to obtain the written consent of the other parent to move the child from the state. If the noncustodial parent or other parent having joint custody refuses to give that consent, the parent planning the move shall, before he leaves the state with the child, petition the court for permission to move the child. The failure of a parent to comply with the provisions of this section may be considered as a factor if a change of custody is requested by the noncustodial parent or other parent having joint custody.¹⁵⁴

In 1994, the court clarified its relocation guidelines to correct what it considered an overly strict interpretation of the burden imposed on the custodial parent. It reminded the lower courts that "what is in the best interest of the children cannot be addressed without considering the best interest of the other members of the household in which they live."¹⁵⁵ In assessing whether the custodial parent had met the "actual advantage" requirement, it stated that courts are not free to ignore non-economic factors that are likely to contribute to the well-being and general happiness of the custodial parent and children. The court then emphasized that the custodial parent need only show a sensible good faith reason for the move and indicated that a good faith reason "means one that is not designed to frustrate the visitation rights of the noncustodial parent."¹⁵⁶

The court also addressed the visitation issue, commenting that reasonable, alternative visitation is visitation that will provide an adequate basis for preserving and fostering a child's relationship with the noncustodial parent if the removal is allowed. It took special note of the fact that the proposed new residence of the children in the case before it

153. *Schwartz v. Schwartz*, 812 P.2d 1268, 1270-71 (Nev. 1991).

154. NEV. REV. STAT. § 125A.350 (1991).

155. *Jones v. Jones*, 885 P.2d 563, 568 (Nev. 1994).

156. 885 P.2d at 569. This concern echoes that expressed in the guidelines proposed by this article; it should be tempered, however, by the recognition those guidelines provide that a custodial parent may properly seek to decrease a child's transfers between households in cases of high conflict or abuse. This issue has been specifically addressed by the MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE. See note 76 *supra*.

was only three hours by car from the noncustodial parent's residence. The court said that though the drive might be burdensome, it was certainly neither impossible nor financially prohibitive. The court noted that

If either is to sacrifice in this respect, there is indeed less reason to demand the sacrifice to be made by the custodial parent since it is she in the end who must arrange her life in a manner consistent with the day-to-day burdens of simultaneously raising a child and pursuing a career.¹⁵⁷

Nevada's lower courts, however, apparently continued to apply the state's removal guidelines too harshly with regard to custodial parents.¹⁵⁸ In 1995 the Nevada Supreme Court again voiced its concerns, finding it

disturbing that despite our [1991] decision in *Schwartz*, many district courts are using [the relocation statute] as a means to chain custodial parents, most often women, to the state of Nevada. [The statute] is primarily a notice statute intended to prevent one parent from in effect "stealing" the children away from the other parent by moving them away to another state and attempting to sever contact. Given the legislative purpose behind [the section], it should not be used to prevent the custodial parent from freely pursuing a life outside of Nevada when reasonable alternative visitation is possible.¹⁵⁹

It then chided the lower court for focusing on maintaining the noncustodial parent's existing visitation pattern to the exclusion of considering whether reasonable, alternative visitation was possible.

4. WISCONSIN

The Wisconsin legislature has created a statutory presumption expressly stating that continuation of custody with the primary caretaker is in the best interest of the child.¹⁶⁰ In the relocation context, the statute accordingly places the burden on a noncustodial parent who opposes the child's removal, first, to instigate litigation,¹⁶¹ then to bear a heavy

157. 885 P.2d at 570. The court's opinion can be compared usefully to California's appellate decisions in *Burgess*, *McGinnis*, and *Selzer*. See *supra* note 33 and accompanying text.

158. See *Cook v. Cook*, 898 P.2d 702, 706 (Nev. 1995); *Gandee v. Gandee*, 895 P.2d 1285, 1288-89 (Nev. 1995).

159. *Trent v. Trent*, 890 P.2d 1309, 1313 (Nev. 1995) (footnote omitted).

160. WIS. STAT. ANN. § 767.327(3)(a)(2)(a) (West 1993).

161. *Id.* § 767.327. Rather than seek permission to relocate, a parent who intends to move with the children out of state, or a distance more than 150 miles within the state, is required to give the other parent 60 days' written notice. *Id.* § 767.327(1). In California, a court may order a parent to provide notice of an intended relocation. CAL. FAM. CODE § 3024 (West 1994). This section, which was misread in *In re Marriage of McGinnis*, 9 Cal. Rptr. 2d 182, 185 (Cal. Ct. App. 1992), to require notice in all cases, is more appropriate than either the Wisconsin statute or the forced reading given it by *McGinnis*; the requirement is imposed only if a court decides that

burden to show that the proposed move constitutes a change of circumstance so substantial that the best interest of the child requires a transfer of custody.¹⁶²

According to the Wisconsin Supreme Court the removal statute aims to protect the relationship between the child and the noncustodial parent, but was "not designed to burden unduly the custodial parent or to impede his or her decision-making authority as the primary caretaker."¹⁶³ Visitation, it said, is a flexible arrangement that parents and the court can modify as circumstances require without undermining the relationship of the child and the noncustodial parent.

In its interpretation of the removal statute, the court directed lower courts to recognize certain basic premises when deciding whether to permit a removal: (1) the custodial parent has the responsibility and the power to make decisions for the family unit, (2) the custodial parent's well-being is closely related to the well-being of the children, and (3) the trial court has broad latitude in fashioning and modifying visitation arrangements, but limited latitude in changing custody.¹⁶⁴

These principles were amplified when the supreme court later interpreted the removal statute as requiring the noncustodial parent to seek a change of custody on the grounds that the custodial conditions in the other state would be harmful to the best interest of the child. This, it said, would entail a showing that (1) removal from the state is against the best interest of the child, and (2) there are no reasonable alternative visitation arrangements (namely, less frequent but more extended visits) that would preserve the children's relationship with the noncustodial parent.¹⁶⁵

5. MINNESOTA

The custodial parent in Minnesota is presumptively entitled to remove the child to another state unless the party opposing removal establishes, by a preponderance of the evidence, that the move is not in the best interest of the child or is sought for the purpose of interfering with visitation.¹⁶⁶ This presumption in favor of removal is not readily apparent from the face of Minnesota's removal statute, which provides,

it is needed, and only in cases where the custodial parent has, accordingly been made aware of the requirement. Further, its express purpose is to allow time for mediation purposes, suggesting that lengthier delays to permit litigation are inappropriate.

162. WIS. STAT. ANN. § 767.327(3) (West 1993). This litigational scheme reflects similar burdens and standards to those CAL. FAM. CODE § 7501 provides for California law.

163. Long v. Long, 381 N.W.2d 350, 356 (Wis. 1986).

164. *Id.* at 357.

165. Bohms v. Bohms, 424 N.W.2d 408, 410 (Wis. 1988).

166. Silbaugh v. Silbaugh, 543 N.W.2d 639, 641 (Minn. 1996); Auge v. Auge, 334 N.W.2d 393, 398-99 (Minn. 1983).

The custodial parent shall not move the residence of the child to another state except upon order of the court or with the consent of the noncustodial parent, when the noncustodial parent has been given visitation rights by the decree. If the purpose of the move is to interfere with visitation rights given to the noncustodial parent by the decree, the court shall not permit the child's residence to be moved to another state.¹⁶⁷

Like the supreme courts of Vermont and Wisconsin, however, the Minnesota Supreme Court recognized that denial of permission to move would effect a change of custody in many cases and decided that the removal provision should therefore be subject to the same constraints as a custody modification.¹⁶⁸ The state's modification statute, in turn, provides a preference for retaining the established custodian unless the child is presently endangered and the benefits of a change outweigh the harm of disruption.¹⁶⁹

Minnesota's case law goes one step beyond that of other jurisdictions in its effort to ameliorate the practical burdens that result from its statutory rule, which requires the custodial parent to seek permission from the noncustodial parent or the court before leaving: permission to remove a child from Minnesota may be granted without an evidentiary hearing unless the parent resisting the move makes a prima facie case against removal.¹⁷⁰

Central to the reasoning of the Minnesota Supreme Court is its view that the custodial parent and the children are a new family unit. What is best for the children is considered in the context of what is best for this new family. Decisions concerning the welfare of the child are thought to be best left to the custodial parent who, because of his or her day-to-day relationship with the child, is best suited to judge the child's needs. The court thus takes the view that the custodial parent's decision about where the family unit will live should be second-guessed only where it would present a "clear danger to the child's well-being."¹⁷¹

167. MINN. STAT. ANN. § 518.175 (West 1990).

168. *Auge*, 334 N.W.2d at 397; *accord* Forslund v. Forslund, 225 Cal. App. 2d 476, 37 Cal. Rptr. 489 (1st Dist. 1964).

169. MINN. STAT. ANN. § 518.18(d) (West 1990). This protection is not given, however, to primary caretakers, who share joint legal and physical custody; even primary caretakers who have far greater responsibilities under their orders are subjected by the statute to a "best interest" standard. *Id.* § 518.18(e) (West Supp. 1995); *Ayers v. Ayers*, 508 N.W.2d 515, 520 (Minn. 1993).

170. *Silbaugh*, 543 N.W.2d at 641-42 (normal stresses associated with moving and separation from noncustodial parent are insufficient to trigger a hearing); *Auge*, 334 N.W.2d at 396.

171. *Auge*, 334 N.W.2d at 396. The *Silbaugh* court reaffirmed this reasoning, emphasizing that the primary consideration is the children's "need for a sense of stability in their familial arrangements." *Silbaugh*, 543 N.W.2d at 642.

6. INDIANA

Indiana's relocation statute specifies change of custody as the only means for resisting relocation of children with their custodial parents. The statute provides in relevant part:

(a) If an individual who has been awarded custody of a child . . . intends to move to a residence . . . that is outside Indiana or one hundred (100) miles or more from the individual's county of residence, that individual must file a notice of that intent with the clerk of the court that issued the custody order and send a copy of the notice to the parent who was not awarded custody and who has been granted visitation rights

(b) Upon request of either party, the court shall set the matter down for a hearing for the purposes of reviewing and modifying if appropriate the custody, visitation, and support orders. The court shall take into account the distance involved in the proposed change of residence and the hardship and expense involved for noncustodial parents to exercise such rights, in determining whether to modify the custody, visitation, and support orders.¹⁷²

The standard for custody modification is also set by statute. Courts in Indiana may modify custody provisions only upon "a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable."¹⁷³ This standard applies to changes in the child's primary physical custodian in joint custody situations as well as to sole custody modifications.¹⁷⁴ This heavy burden is imposed on the parent seeking a change of custody because continuity of the child's primary caretaker is considered best for the welfare and happiness of the child.¹⁷⁵

Beyond these basics, the Indiana Supreme Court has provided little guidance on the appropriate analysis for relocation cases. The court has indicated that a move out of state does not per se constitute a substantial change of circumstances so as to make that parent's continued custody unreasonable.¹⁷⁶ The actual determination of whether the effects of a proposed move on the child are of such a nature as to require a change of custody, however, has not been refined beyond entrusting the decision to the discretion of the trial court based on the totality of the circumstances. The court's most recent opinion contains language emphasizing the negative impact of relocation on the noncustodial parent.¹⁷⁷ The opinion does not, however, discuss how this negative impact is to be weighed against the benefits of maintaining custodial

172. IND. CODE ANN. § 31-1-11.5-21.1 (Burns Supplement 1995).

173. IND. CODE ANN. § 31-1-11.5-22(d) (Burns Supplement 1995).

174. *Lamb v. Wenning*, 600 N.E.2d 96, 98 (Ind. 1992).

175. *Id.*

176. *Id.*; *Poret v. Martin*, 434 N.E.2d 885, 890 (Ind. 1982).

177. *Id.* at 99.

stability—a notion strongly endorsed earlier in the same opinion.¹⁷⁸ This lack of guidance means that proposed relocations will likely trigger full-blown, time consuming, expensive, and unpredictable custody proceedings in Indiana.

7. MAINE

In 1987, the Supreme Judicial Court of Maine affirmed a trial court decision that a custodial mother's impending move to California as a result of her present husband's transfer there by the Navy was not a sufficient change in circumstances to warrant altering the child's primary custody.¹⁷⁹ Shortly thereafter, the Maine legislature added the following provision to its custody statute:

The relocation, or intended relocation, of a child resident in this State to another state by a parent, when the other parent is a resident in this State and there exists an award of shared or allocated parental rights and responsibilities concerning the child, is a substantial change in circumstances.¹⁸⁰

The court applied this new provision in the 1993 case of *Rowland v. Kingman*.¹⁸¹ After the divorce in that case, the custodial mother and children remained at the family home in Yarmouth, while the father moved to Winslow. When the mother subsequently remarried, she also sought to move with the children to join her new husband in Oregon.

Because the statutory provision established the mother's intended relocation as a per se substantial change in circumstances, the case was not treated as a custody modification case and the issue of custodial continuity was never addressed by the court. Rather, the trial court engaged in a wide-ranging best interest analysis guided loosely by the statutory factors applicable to initial custody determinations.¹⁸² The trial court determined that the children would suffer equally from being distant from either parent. Instead of custodial continuity, the court focused to an unusual degree on environmental continuity. It ordered that the children's primary physical residence be with the mother so long as she continued to reside in Yarmouth; if she moved to Oregon, the children's primary physical residence would shift to the father, but only if he moved back to Yarmouth.¹⁸³ The Supreme Judicial Court of Maine found no abuse of discretion in the trial court's restriction

178. *Id.* at 98.

179. *Villa v. Smith*, 534 A.2d 1310 (Me. 1987).

180. ME. REV. STAT. ANN. tit. 19, § 752(12) (West 1992).

181. 629 A.2d 613 (Me. 1993).

182. ME. REV. STAT. ANN. tit. 19, § 752(5) (West Supp. 1992).

183. 629 A.2d at 615.

of the children's residence to a location where, as the dissent noted, neither parent wished to reside.¹⁸⁴

It is doubtful that the statutory provision making out-of-state relocations per se substantial changes of circumstances was intended to eliminate the importance of custodial continuity in modifying child custody in Maine. If it was, Maine would be significantly out of step with most other jurisdictions. Additionally, because of the unstructured best interest analysis employed, the extremely wide range of discretion afforded to lower court's under this standard, and the lower court's unusual focus on environmental stability in this case, it seems unlikely that this case will be an important precedent for future relocation cases.

D. No Relocation Statute

Several additional supreme courts have addressed relocation custody issues in the past decade unconstrained by relocation or "frequent and continuing contact" statutes. Most have recognized that children's well-being after divorce is closely tied to the well-being of the custodial family unit. Some of these have created a common-law presumption that continuation of the current primary custodian is in the best interest of the child in relocation cases. In contrast, a few states have adopted a wide-ranging best interests approach, with little more to guide the lower courts than general descriptions of the considerations trial courts should balance in determining whether a move is in the best interests of the child.

1. ALABAMA

The Alabama Supreme Court reversed a temporary restraining order that had prevented a custodial mother from removing her child from the state and had changed the child's custody to its father.¹⁸⁵ Charges of kidnapping and contempt had been lodged against the mother, and she had been denied visitation. The supreme court held that disruption of the father's visitation rights did not establish the "immediate and irreparable injury, loss or damage" necessary to temporarily restrain the child's removal.¹⁸⁶ Indeed, the court noted that "a parent entrusted with the custody of a child has the right, if not restricted by the court, to remove the child from the jurisdiction of the court granting custody."¹⁸⁷ Because it found that the order transferring custody to the father had

184. *Id.* at 617.

185. *Ex parte Williams*, 474 So. 2d 707 (Ala. 1985).

186. *Id.* at 711.

187. *Id.* at 712, quoting *Cheatham v. Cheatham*, 344 So. 2d 525, 527 (Ala. Civ. App. 1977).

to be reversed on due process grounds, the court did not reach the merits of the father's modification request.

More recently, the court did address the standard controlling custody modifications in relocation cases.¹⁸⁸ The court appears to have assumed that a move outside the state would constitute a material change in circumstances so as to reopen the question of custody.¹⁸⁹ Once the custody issue is reopened, the person seeking the change of custody has the burden of demonstrating that the benefits to the child of changing custody outweigh the inherently disruptive effects of uprooting the child from an established custodial relationship.¹⁹⁰

2. ALASKA

The Alaska Supreme Court has held that a custodial parent's decision to leave the state with the children constitutes a *per se* substantial change in circumstances.¹⁹¹ The court explained that existing visitation arrangements assume that parents will continue to live in the same geographic area. When distances between the child and noncustodial parent are significantly increased, some modification will be required.¹⁹² Thus, when parents cannot agree on a mutually acceptable custody and visitation arrangement, the noncustodial parent is entitled to a judicial hearing to resolve whether to adjust the visitation schedule or to change custody.¹⁹³

The standard enunciated by the court for deciding whether to adjust visitation or to change custody in relocation cases is the best interest of the child.¹⁹⁴ The court clarified that the burden is on the noncustodial parent to demonstrate that changed circumstances warrant a change in custody.¹⁹⁵ The court also provided context for the best interest analysis by noting that Alaska has not adopted an anti-removal statute and that most states permit custodial parents to move out of state with their

188. *Ex Parte* Murphy, 670 So. 2d 51 (Ala. 1995); see also *Ex Parte* Jones, 620 So. 2d 4 (Ala. 1992).

189. In *Jones* the original decree provided that such a move would constitute a change in circumstances sufficient to reopen the question of custody, so at the time of the move the court did not have to decide whether a move absent such an order would present a material change in circumstances. In *Murphy*, the court did not discuss the issue of changed circumstances, but proceeded directly to examine the standard for custody modifications.

190. *Ex Parte* Murphy, 670 So. 2d at 53; *Ex Parte* Jones, 620 So. 2d at 6.

191. *House v. House*, 779 P.2d 1204, 1207-08 (Alaska 1989).

192. *Id.* at 1207.

193. *Id.* at 1208.

194. *Id.* at 1208; *Lee v. Cox*, 790 P.2d 1359, 1361 (Alaska 1990); *Pinneo v. Pinneo*, 835 P.2d 1233, 1238 (Alaska 1992); *McQuade v. McQuade*, 901 P.2d 421 (Alaska 1995).

195. *Lee v. Cox*, 790 P.2d at 1361.

children if there is a legitimate reason for the move.¹⁹⁶ Thus, lower courts were directed to consider the best interest of the children, applying the criteria in Alaska Stat. § 25.24.150(c),¹⁹⁷ and to consider whether there was a legitimate reason for the move.¹⁹⁸

3. IDAHO

Following a line of reasoning similar to that of the Alaska court, the Idaho Supreme Court recently held that a move out of state constitutes a substantial change of circumstances sufficient for the noncustodial parent to be granted a best interest hearing.¹⁹⁹ The court reasoned that a move out of state would render it impossible for the noncustodial parent to continue the current visitation schedule and that the existing order thus needed to be modified. The court cautioned, however, that a proposed move does not automatically necessitate a change of custody. Rather, the fact of a move illustrates the likelihood that there needs to be some modification of either visitation or custody to reflect the new circumstances. The court emphasized that a party seeking a change of custody still bears the burden of demonstrating that the best interest of the child will be served by modification.²⁰⁰

4. MARYLAND

Maryland recently backed away from a position supporting the custodial parent's ability to relocate with the child to a stance its courts characterize as neutral. Prior to 1991,²⁰¹ noncustodial parents in Maryland could resist removal only by seeking a change of custody. The state recognized a strong policy favoring continuation of the primary

196. *McQuade*, 901 P.2d at 424.

197. ALASKA STAT. § 25.24.150(c) (1995) states:

The court shall determine custody in accordance with the best interests of the child under AS 25.20.060-25.20.130. In determining the best interests of the child the court shall consider

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

198. *McQuade*, 901 P.2d at 424.

199. *Osteraas v. Osteraas*, 859 P.2d 948, 951 (Idaho 1993).

200. *Id.*

201. The law changed in *Domingues v. Johnson*, 593 A.2d 1133 (Md. 1991).

custodian.²⁰² This meant that the parent resisting the move had the burden to demonstrate significantly changed circumstances before the courts would reconsider which parent was better suited to have custody of the child.²⁰³ A relocation out of the jurisdiction was not considered sufficient, by itself, to trigger such reconsideration.²⁰⁴

The court of appeals moved away from this approach in *Domingues v. Johnson*.²⁰⁵ Conceding that the then existing rule promoted continuity as to the child's primary caretaker, the court stated there were differing views on whether the interest of the child is best served by stability of a primary caretaker or by ensuring significant day-to-day contact with both parents.²⁰⁶ The court noted that keeping children in the area where they had always lived and where they could continue their association with friends and extended family also provided a form of stability.²⁰⁷ The court made clear that from then on "changes brought about by the relocation of a parent may, in a given case, be sufficient to justify a change in custody."²⁰⁸

Although Maryland's courts characterize the state's new relocation standard as being neutral and favoring neither parent,²⁰⁹ the test is not neutral. By throwing the custody decision open to a wide-ranging best interest inquiry that can be triggered solely by the normal incidents of moving, the standard places extra burdens on the custodial parent.

The custodial parent already established, at the time of the initial custody decision, that he or she was best suited to provide the child's day-to-day care. To reopen that inquiry based solely on that parent's subsequent desire to relocate elevates geography over parenting skills and divests the child's interest in maintaining its established custodial relationship of its proper weight—weight that should increase with the passage of time. The qualities that made the custodial parent the preferred custodian do not evaporate when that parent moves to a new home in another jurisdiction.

As other courts have recognized, disruption of the children's environmental stability is a normal part of moving. Most children adjust quickly to new neighborhoods, schools, and religious communities, and make new friends. The central task in relocation disputes, as in other custody

202. *Jordan v. Jordan*, 439 A.2d 26, 29 (Md. Ct. Spec. App. 1982).

203. *Id.* at 29.

204. *Id.*

205. 593 A.2d 1133 (Md. 1991).

206. *Id.* at 1140.

207. *Id.* at 1141.

208. *Id.* at 1140.

209. *Goldmeier v. Lepselter*, 598 A.2d 482 (Md. Ct. Spec. App. 1991).

disputes, is to identify which parent is better suited to be the child's primary custodian.

The Maryland court's view of environmental stability inures to the benefit of the parent who is remaining behind in every case. It also ignores or minimizes the environmental disruptions that may attend a custody transfer itself, and minimizes the importance of continuity in the child's primary relationship. In effect, the custodial parent must overcome a presumption that "environmental stability" can be maintained through a custody transfer and that this kind of stability will benefit the child even when it entails separation from the child's primary caregiver. Maryland law has thus moved from a policy of protecting the child's continuing relationship with the custodial parent to a position that burdens it.

5. MICHIGAN

The Michigan Supreme Court decided its only relocation case with a one paragraph order vacating the judgment below and remanding the case to allow the custodial mother an opportunity to present a visitation plan that would adequately preserve the father's relationship with the children.²¹⁰

Justice Riley, however, wrote separately to provide guidance on the proper analysis of relocation cases. She agreed with the Michigan Courts of Appeal that application of the *D'Onofrio* factors is appropriate in such disputes.²¹¹ In her view the burden on the custodial parent in *D'Onofrio* is a light one that "recognizes the increasingly legitimate mobility of our society."²¹²

Echoing the sentiments of the *D'Onofrio* court, Justice Riley emphasized that the well-being of the children and the custodial parent are intertwined.²¹³ She also embraced the widely adopted *D'Onofrio* view that preservation of existing visitation schedules should not be used to prevent relocations. Rather, the noncustodial parent's ability to maintain a relationship with the child can be preserved, perhaps even enhanced, by providing for longer, less frequent periods of visitation

210. *Costantini v. Costantini*, 521 N.W.2d 1, 1 (Mich. 1994).

211. *Id.* at 2.

212. *Id.* at 2, n.2, quoting *Henry v. Henry*, 326 N.W.2d 497 (1982).

213. [A] court must realize that possible improvement in the quality of life for the custodial parent, the primary caregiver in the family, will be intertwined with or give some benefit to the children, whether it is economic, emotional, or simply easing the caregiver's responsibilities with support from family and friends.

Id. at 2, quoting *Watters v. Watters*, 314 N.W.2d 778 (Mich. App. 1981).

that permit the noncustodial parent to exercise more sustained parental responsibility.²¹⁴

6. MISSISSIPPI

The Supreme Court of Mississippi has supported the custodial parent's ability to relocate in a long line of cases.²¹⁵ Its opinions recognize that there are many valid reasons why custodial parents need to relocate with their children²¹⁶ and acknowledge that the parent having physical custody of the child has both the obligation to provide a residence for the child and the discretion to decide where that residence will be located.²¹⁷

In explaining its approach to relocation cases, the court has emphasized that the best interest of the child has already been determined in the original custody proceeding. Thus, a change of custody can be justified only upon a showing of a material change in circumstances which adversely affects the children's welfare.²¹⁸ A move by the custodial parent with the children out of state has accordingly been held not to constitute per se such a change in circumstances, even though it might cause a hardship on the other spouse with regard to existing visitation privileges.²¹⁹

The court reasoned that children were already adversely affected by the simple fact of their parents' divorce and that they would be further adversely affected by a long distance relocation of either parent. However, the court observed, nothing would be solved by shifting custody to the parent staying at home since a long distance separation from either parent would adversely affect the child.²²⁰ Rather, "[t]he judicial eye in such cases searches for adverse effects beyond those created (a) by the divorce and (b) by the geographical separation from one parent."²²¹ The court indicated that the logistical difficulties of long

214. *Id.* at 3.

215. *Bell v. Bell*, 572 So.2d 841 (Miss. 1990); *Stevison v. Woods*, 560 So. 2d 176 (Miss. 1990); *Spain v. Holland*, 483 So. 2d 318 (Miss. 1986); *Pearson v. Pearson*, 458 So. 2d 711 (Miss. 1984); *Cheek v. Ricker*, 431 So. 2d 1139 (Miss. 1983).

216. *Cheek v. Ricker*, 431 So. 2d at 1144 ("In this day and time many persons must change their residence, sometimes even cross-country, in order to obtain suitable employment, and for other bona fide reasons."); *Spain v. Holland*, 483 So. 2d at 321 ("We close our eyes to the real world if we ignore that ours is a mobile society.").

217. *Bell v. Bell*, 572 So. 2d at 847.

218. *Spain v. Holland*, 483 So. 2d at 320.

219. *Pearson v. Pearson*, 458 So. 2d at 713-14.; *Stevison v. Woods*, 560 So. 2d at 180; *Bell v. Bell*, 572 So. 2d at 847.

220. *Spain v. Holland*, 483 So. 2d at 320.

221. *Id.* at 320-21.

distance visitation were “legally irrelevant to the matter of permanent custody.”²²² Thus, to successfully petition for a change of custody in a relocation case, the noncustodial parent must demonstrate “peculiar or unusual circumstances adversely affecting the children over and above the effect attendant upon the mere increase in miles between the children and the non-custodial parent.”²²³

7. NEBRASKA

The Supreme Court of Nebraska has heard more than a dozen relocation custody cases since 1982.²²⁴ These cases follow a pattern similar to that seen in other jurisdictions²²⁵:

1. because of the wide discretion accorded to trial courts in deciding custody issues, the court most often affirms trial court decisions,²²⁶ and
2. when reversals do occur, they are reversals of overly harsh restrictions on custodial parents' mobility.²²⁷

Unlike the mixed messages that may have confused lower courts in Illinois, the message from the Nebraska Supreme Court has been consistent from the beginning: Removal of a minor child from the jurisdiction will generally be permitted if the custodial parent has a legitimate reason for leaving the state and it is in the best interest of the child to continue to live with that parent.²²⁸ The court made clear that career or marital changes would generally support an application

222. *Id.* at 321.

223. *Id.*

224. *Gottschall v. Gottschall*, 316 N.W.2d 610 (Neb. 1982); *Jensen v. Jensen*, 319 N.W.2d 75 (Neb. 1982); *Marez v. Marez*, 350 N.W.2d 531 (Neb. 1984); *Boll v. Boll*, 363 N.W.2d 542 (Neb. 1985); *Parsons v. Parsons*, 365 N.W.2d 841 (Neb. 1985); *Korf v. Korf*, 378 N.W.2d 173 (Neb. 1985); *Little v. Little*, 381 N.W.2d 161 (Neb. 1986); *Vanderzee v. Vanderzee*, 380 N.W.2d 310 (Neb. 1986); *Hicks v. Hicks*, 388 N.W.2d 510 (Neb. 1986); *Maack v. Maack*, 389 N.W.2d 318 (Neb. 1986); *Gerber v. Gerber*, 407 N.W.2d 497 (Neb. 1987); *Demerath v. Demerath*, 444 N.W.2d 325 (Neb. 1989); *Harder v. Harder*, 524 N.W.2d 325 (Neb. 1994).

225. *See, e.g.*, Illinois, *supra* notes 114-125 and accompanying text, and Nevada, *supra* notes 153-159 and accompanying text.

226. Orders directing a change of custody or denying permission to relocate children were affirmed in *Marez*, 350 N.W.2d 531 (1984); *Parsons*, 365 N.W.2d 841 (1985); and *Vanderzee*, 380 N.W.2d 310 (1986). Orders granting permission to remove children were affirmed in *Gottschall*, 316 N.W.2d 610 (1982); *Jensen*, 319 N.W.2d 75 (1982); *Maack*, 389 N.W.2d 318 (1986); *Gerber*, 407 N.W.2d 497 (1987); and *Demerath*, 444 N.W.2d 325 (1989).

227. Orders denying permission to relocate were reversed in *Boll*, 363 N.W.2d 542 (1985); *Korf*, 378 N.W.2d 173 (1985); *Little*, 381 N.W.2d 161 (1986); and *Harder*, 524 N.W.2d 325 (1994).

228. *Jensen*, 319 N.W.2d at 76; *Boll*, 363 N.W.2d at 545; *Vanderzee*, 380 N.W.2d at 312; *Hicks*, 388 N.W.2d at 515; *Maack*, 389 N.W.2d at 318; *Demerath*, 444 N.W.2d at 325; *Harder*, 524 N.W.2d at 328.

for changing the residence of a child placed in that parent's custody²²⁹ and that an improved standard of living for the custodial parent is in the child's best interest.²³⁰ Recognizing the "Sophie's Choice" inherent in denying permission to relocate, the court emphasized that a custodial parent should not be put in the position of having to decide between custody of a child and a more successful career.²³¹

Its opinions have also recognized the importance of custodial continuity. Neither community ties nor a reduction in visitation, for example, necessarily mandates prohibiting a custodial parent from relocating for a legitimate reason.²³² Indeed, the court has noted, changing custody in such situations only serves to destroy the stability the child has enjoyed in the custodial parent's home.²³³ After more than a decade of repeating itself, the court in its most recent case once again reminded the lower courts that an award of custody to a parent should not be interpreted as a sentence to immobility.²³⁴

8. NEW YORK

The New York Court of Appeals recently made sweeping changes to its standard for deciding relocation custody disputes. After more than a decade as the jurisdiction with the standard harshest to custodial parents, New York has moved to a stance significantly more supportive of the custodial "post-divorce family unit."²³⁵

The "exceptional circumstances" standard that had formerly been applied by the state's lower courts to decide relocation disputes had been based, probably erroneously, on language from *Weiss v. Weiss*.²³⁶ The *Weiss* court had indicated that post-divorce visitation by noncustodial parents was generally desirable because it enabled children to maintain contact with both parents. It therefore remarked,

229. *Little*, 381 N.W.2d at 162; *Hicks*, 388 N.W.2d at 515; *Harder*, 524 N.W.2d at 328.

230. *Boll*, 363 N.W.2d at 545.

231. *Boll*, 363 N.W.2d at 545; *Korf*, 378 N.W.2d at 174; *Gerber*, 407 N.W.2d at 503; *Harder*, 524 N.W.2d at 328-29.

232. *Boll*, 363 N.W.2d at 545; *Little*, 381 N.W.2d at 162; *Hicks*, 388 N.W.2d at 515; *Maack*, 389 N.W.2d at 318; *Harder*, 524 N.W.2d at 329.

233. *Little*, 381 N.W.2d at 162; *Hicks*, 388 N.W.2d at 514.

234. See *Harder*, 524 N.W.2d at 328 (reversing lower court's denial of premission to custodial parent to move with the child to Arizona to live with her new husband, who was employed there). *Accord Gotschall*, 316 N.W.2d at 612; *Boll*, 363 N.W.2d at 545; *Korf*, 378 N.W.2d at 174; *Little*, 381 N.W.2d at 162; and *Hicks*, 388 N.W.2d at 515.

235. *Tropea v. Tropea*, 665 N.E.2d 145 (N.Y. 1996).

236. 418 N.E.2d 377 (N.Y. 1981). The court of appeals also heard a relocation case the following year in *Daghir v. Daghir*, 439 N.E.2d 324 (N.Y. 1982). This very short memorandum opinion contained little substantive discussion and was followed by a lengthy and passionate dissent.

in initially prescribing or approving custodial arrangements, absent exceptional circumstances, such as those in which it would be inimical to the welfare of the child or where a parent in some manner has forfeited his or her rights to such access, appropriate provision for visitation or other access by the noncustodial parent follows almost as a matter of course.²³⁷

This language was typical of many jurisdictions where visitation could not be denied completely unless exceptional circumstances would make contact with the noncustodial parent detrimental to the child's well-being.²³⁸ New York's lower courts, however, used this language to impose an "exceptional circumstances" requirement before a noncustodial parent's scheduled visitation could be altered in any nontrivial way.

After the *Weiss* decision, guidelines and presumptions evolved in the lower courts to aid in deciding relocation cases. The typical formula employed a three-step analysis. First, it had to be determined whether the proposed relocation would deprive the noncustodial parent of "regular and meaningful access to the child." If not, the custodial parent was generally allowed to move. If so, the second step applied a presumption that the move was not in the child's best interests. To overcome the presumption and justify the move, the custodial parent seeking to relocate was required to demonstrate exceptional circumstances. For many courts, that burden was met only by a showing of economic necessity or health-related compulsion. Demands of a new marriage were often rejected as sufficient, even if it meant forcing custodial parents to choose between their new spouses and their children. Only in the unusual case where exceptional circumstances could be demonstrated was the child's best interest considered.²³⁹ This approach put New York significantly out of step with other states on the relocation issue.

In *Tropea v. Tropea*,²⁴⁰ the New York Court of Appeals replaced the "exceptional circumstances" standard with a wide-ranging best interests approach. Because a "best-interest-of-the-child" standard without more is so amorphous as to be unhelpful, *Tropea's* real guidance comes in the court's discussion of relevant factors in relocation cases.

The court indicated that the impact of the move on the relationship between the child and the noncustodial parent, although still a central

237. *Weiss*, 418 N.E.2d at 380 (citation omitted).

238. See, e.g., *Hagler v. Hagler*, 460 So. 2d 187, 188 (Ala. Civ. App. 1984); *Freeburg v. Freeburg*, 596 So. 2d 794, 796 (Fla. Dist. Ct. App. 1992); *Shook v. Shook*, 247 S.E.2d 855, 856 (Ga. 1978); *Shapiro v. Shapiro*, 458 A.2d 1257, 1261 (Md. Ct. Spec. App. 1983).

239. *Tropea*, 665 N.E.2d 145 (N.Y. 1996).

240. *Id.*

concern, should not be given such disproportionate weight as to predetermine the outcome.²⁴¹ It recognized the existence of cases where the loss of mid-week or every-weekend visits may devastate the relationship between the noncustodial parent and the child, but also emphasized that

there are undoubtedly also many cases where less frequent but more extended visits over summers and school vacations would be equally conducive, or perhaps even more conducive, to the maintenance of a close parent-child relationship, since such extended visits give the parties the opportunity to interact in a normalized domestic setting.²⁴²

The court reflected much greater concern for the well-being of custodial parents than was evident under the old standard. Although economic necessity or specific health-related concerns were seen as particularly persuasive grounds for permitting proposed moves, other justifications, including the demands of a second marriage and the custodial parent's opportunity to improve his or her economic situation, were also viewed as valid. The court commented that rejecting the custodial parent's desire to remarry or have a fresh start "overlooks the value for the children that strengthening and stabilizing the new, post-divorce family unit can have in a particular case."²⁴³ Indeed, the court suggested that in proper cases where the custodial parents' reasons for wanting to relocate were valid, lower courts might consider a parallel move by an involved and committed noncustodial parent as an alternative to restricting the custodial parent's mobility.²⁴⁴

Finally, commenting on the balancing of factors in these cases, the court remarked,

Like Humpty Dumpty, a family, once broken by divorce, cannot be put back together in precisely the same way. The relationship between the parents and the children is necessarily different after a divorce and, accordingly, 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.²⁴⁵

The tone and examples used by the *Tropea* court clearly impose greater protection for custodial parents' ability to relocate without losing custody of their children. Less clear is how trial judges are to decide what weight to give the various factors discussed in the opinion. When

241. *Id.*

242. *Id.* at *6.

243. *Id.*

244. *Id.* at *7.

245. *Id.*

the court of appeals failed to articulate clear guidelines in *Weiss*, the state's lower courts developed a structured framework for their use, and it is likely that they will do the same in the wake of *Tropea*. The experience of other jurisdictions also suggests that asking the trial court in its discretion to weigh all appropriate factors fails to provide a workable long-term solution. As this survey of sister-state case law reveals, most jurisdictions that have considered relocation issues have ultimately delineated guidelines, presumptions, or rules to assist in their analysis. Because the court of appeals stopped short in *Tropea*, the case's impact will depend on lower courts' faithful attention to its spirit. Given the experience of sister states, however, it seems likely that the New York Court of Appeals will one day be asked to clarify its most recent relocation opinion and to provide more structured guidance.

9. TENNESSEE

In *Taylor v. Taylor*,²⁴⁶ the Supreme Court of Tennessee recently attempted to stem the tide of lower court litigation that followed its earlier relocation custody decisions²⁴⁷ by clearly enunciating the legal principles and policies for trial courts to consider when deciding whether removal is in a child's best interest.²⁴⁸ The court first clarified the differing burdens in relocation cases. It held that where there is no order restricting movement of the child from the jurisdiction, the noncustodial parent bears the burden of demonstrating that removal is adverse to the best interest of the child. Where there is a prior restriction on removal, the burden is instead on the custodial parent to show that removal is in the best interest of the child, although this burden can be shifted by a *prima facie* showing of a sincere, good faith reason for the move and a *prima facie* showing that the move is consistent with the child's best interest.

The court's main focus, however, was to announce principles and policies that give appropriate weight to preservation of the existing custodial family unit in relocation cases: (1) custody is not subject to *de novo* review unless the petition cites reasons other than removal as grounds for a modification; (2) there is a strong presumption in favor of continuity of the original custody award; (3) the welfare of the child is affected by the welfare of the custodial parent; (4) removal of the

246. 849 S.W.2d 319 (Tenn. 1993).

247. *Seessel v. Seessel*, 748 S.W.2d 422 (Tenn. 1988) (addressing burden of proof); *Rogero v. Pitt*, 759 S.W.2d 109 (Tenn. 1988) (discussing facts in the record, but without articulating any underlying approach); *Nichols v. Nichols*, 792 S.W.2d 713 (Tenn. 1990) (revisiting burden of proof).

248. *Taylor*, 849 S.W.2d at 326.

child from the jurisdiction may require rescheduling of the noncustodial parent's visitation, but is not, in and of itself, a change of circumstance sufficient to justify modification of custody; (5) courts must be sensitive to the noncustodial parent's effort to maintain his or her relationship with the child, and visitation should be arranged in a manner most likely to enhance that relationship; and (6) the motives of the custodial parent in making the move must not appear to be intended to defeat or deter visitation by the noncustodial parent.²⁴⁹

10. WYOMING

The Supreme Court of Wyoming recently articulated a presumption that custodial parents are allowed to relocate, stating that "so long as the court is satisfied with the motives of the custodial parent in seeking the move and reasonable visitation is available to the remaining parent, removal should be granted."²⁵⁰ The court noted that we live in a transient society and that geographic restrictions on where custodial parents may live with their children are not realistic. The court emphasized that the best interest of the child standard produces an initial custody award and that, if a move later occurs, an "established custodial environment continues to exist despite a change in the children's domicile."²⁵¹ The court thus considered it incongruous, when presented with a custodial order originally based upon the best interest of the child, to refuse to support the efforts of the custodial parent to maintain and enhance the household's standard of living, albeit in another jurisdiction.²⁵²

In response to the father's claims that his weekend visitation could no longer take place because of the distance between the two towns, the court responded that changes in visitation due to relocations are a common result of divorce. In the court's view, the benefits of the move for the mother and child should not be forfeited to maintain the father's weekly visitation where reasonable alternative visitation was available. More than inconvenience to the noncustodial parent must be shown, it said, to defeat the custodial parent's right to relocate. The court determined that, although visitation for the father was made more difficult by the mother's relocation in this case, the alternative visitation that had been provided was within the bounds of reason and the mother had appropriately been permitted to relocate.

249. *Id.* at 332.

250. *Love v. Love*, 851 P.2d 1283, 1288-89 (Wyo. 1993).

251. *Id.* at 1289, quoting *DeGrow v. DeGrow*, 315 N.W.2d 915, 917 (Mich. App. 1982).

252. *Id.* at 1288.

11. OTHER STATES

Some additional state supreme courts have dealt with relocation disputes within the past decade, but remain without clearly articulated doctrines. The supreme courts of Kansas, Kentucky, New Mexico, Ohio, Rhode Island and Virginia, for example, fall into this category.²⁵³ Because they fail to provide significant guidance to their lower courts on the standards to be applied in resolving such cases, the opinions from such states' courts are not addressed here.

IV. Conclusion

Whether interpreting statutes like California Family Code § 7501, statutes that differ from California's, or no statute at all, state supreme courts generally support the ability of custodial parents to relocate with their children.²⁵⁴ Most of these courts have made clear that the relationship between the child and its custodial parent is central to the child's well-being,²⁵⁵ a conclusion that is fully consistent with the latest social science findings. The solicitude they show for the child's continuing membership in the custodial household is, accordingly, consistent with sound public policy, as is their recognition of the custodial parent's legitimate desire to move forward with his or her own life.

253. See, e.g., *In re Marriage of Bradley*, 899 P.2d 471 (Kan. 1995); *Wilson v. Messinger*, 840 S.W.2d 203 (Ky. 1992); *Jaramillo v. Jaramillo*, 823 P.2d 299 (N. Mex. 1991); *Masters v. Masters*, 630 N.E.2d 665 (Ohio 1994); *Kenney v. Hickey*, 486 A.2d 1079 (R.I. 1985); *Gray v. Gray*, 324 S.E.2d 677 (Va. 1985).

254. Many have also noted that the custodial parent's decision about where the child will live is a childrearing matter that should be entitled to deference. See *Long*, 381 N.W.2d at 356 (because of legislative recognition of custodial parent's responsibilities and powers); *Taylor*, 849 S.W.2d at 328 (because the custodial parent was originally determined to be the better parent to provide the child's day-to-day care); *Lane*, 614 A.2d at 789 (because of the impracticality of substituting the court's judgment for that of the custodial parent); *Auge*, 334 N.W.2d at 397 (because the custodial parent is usually the best equipped to make such decisions). As one court reasoned,

It would be incongruous for a court, when presented with a custodial order originally based upon the best interests of the child to refuse to support the efforts of the custodial parent to maintain and enhance their standard of living, albeit in another jurisdiction.

Taylor, 849 S.W.2d at 329.

255. *Jones v. Jones*, 885 P.2d 563, 568-69 (Nev. 1994); *Mize v. Mize*, 621 So.2d 417, 419 (Fla. 1993); *Barstad v. Barstad*, 499 N.W.2d 584, 587 (N.D. 1993); *Taylor v. Taylor*, 849 S.W.2d 319, 328, 329 (Tenn. 1993); *Love v. Love*, 851 P.2d 1283, 1288-89 (Wyo. 1993); *Lane v. Schenck*, 614 A.2d 786, 791 (Vt. 1992); *Bergner v. Owens*, 722 P.2d 1141, 1144 (Mont. 1986); *Long v. Long*, 381 N.W.2d 350, 355, 356 (Wis. 1986); *Yannas v. Frondistou-Yannas*, 481 N.E.2d 1153, 1157-58 (Mass. 1985); *Cooper v. Cooper*, 491 A.2d 606, 612 (N.J. 1984); *Auge v. Auge*, 334 N.W.2d 393, 399 (Minn. 1983).

These sources support a custodial parent's right to relocate the custodial household in all but unusual cases, support properly expressed by a presumption favoring the custodial parent's decision. Restraints or custody transfers are properly imposed, accordingly, only if the noncustodial parent establishes, first, that the child's relocation with the custodial parent will prejudice the child's welfare and, further, that altering the child's primary custodian portends less harm for the child than does a relocation with the household in which the child has been centered.

These principles will not be fully realized, however, until trial courts and the court-related personnel who provide expert advice in custody cases share the convictions enunciated by the state supreme courts and social science sources reviewed here. It is they who will ultimately decide whether the well-being of the children who come before them one by one will be supported or compromised when stability in their primary relationships is challenged.

