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ORIGINAL

No. 72343-0-1

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION ONE

BYRON MCNAUGHT

Petitioner/Appellant,

vs.

ANGELIKA MCNAUGHT

Respondent.

PETITION FOR REVIEW TO THE SUPREME COURT

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I. IDENTITY OF PETITIONER

Byron McNaught is the Petitioner/Appellant in this matter.

II. CITATION TO DECISION OF COURT OF APPEALS

Byron McNaught seeks review of *In re Marriage of McNaught,* No. 72343-0-1.

III. ISSUES PRESENTED FOR REVIEW

1. Does imposing a presumption under RCW 26.09.520 before a final parenting plan is entered in a dissolution of marriage action violate the right of access to a judge and full trial under the Washington Constitution and the 14th Amendment of the federal Constitutions?

2. Does the presumption, as applied by Division One of the Court of Appeals, violate the equal protection clauses under Article 1, §12 of the Washington Constitution and the federal Constitution?

3. Should review be granted where Division Two and Division One conflict regarding how presumptions are applied in context of parenting?

4. Should the rule announced by Division One be reversed where it is based upon outdated social science, will put children and families in Washington at risk, and will spur litigation, rather than settlement of parenting issues?

IV. STATEMENT OF THE CASE

Angelika and Byron McNaught married in 2004. *RP 931; Exhibit 25 at 97.* They lived in Texas. *Exhibit 130 at p. 3 and p.7.* In 2010, Angelika was unemployed and Byron felt his career was stifled. *RP 72 at 6-7, 23-25.* He secured a position in Seattle. *RP 1102 at lines 13-16.* The parties settled into an apartment on Mercer Island. *RP 940 at 23-25, and RP 941 at 1-3.* Angelika was offered a web design position. *RP 73 at 22-25.* Her employer allowed her to work from home. *RP 75 at 13-17; RP 78.*

In 2012, their daughter, AJM, was born. *Exhibit 25 at p. 148.* Byron's parents moved from Florida to Mercer Island to be near the family and to provide for their childcare needs. *RP 845 at lines 24, and RP 846 at lines 2-7.* Laurel McNaught became "Nana," and for the next 15 months, provided daily child care with AJM. *RP 852 at lines 7-19.* AJM became very attached to her Nana and her grandfather. *RP 361 at 19-21, 23.*

In the summer of 2013, Angelika petitioned for dissolution of marriage. AJM was not yet two. *CP 23.* Parenting was hotly contested. CP 29-39. Angelika moved for temporary orders that would allow her to relocate AJM to Texas. *CP 166.* She stated that Byron made her life miserable, she wanted to be near her parents, and she wanted to buy a house. *CP 33 at 7-11.*

The court denied the child's relocation on a temporary basis, awarded primary residential care to Angelika, and appointed Wendy Hutchins-Cook, Ph.D. to evaluate, *inter alia,* all aspects of a parenting plan and the relocation issue. *CP 161, 164.* Over Angelika's objection, the trial court also ordered that AJM's relationship and contact with her "Nana" would be preserved. *CP 217.* Laurel McNaught would continue to provide child care. *CP 217.*

Thereafter, Angelika reported to Dr. Hutchins-Cook that she no longer contemplated a change in her residence. *Exhibit 25 at 104, 108.* She realized that it was better for AJM to be near her father. *RP 254 at 18-19.* She also reported that her parents were moving to Washington and would seek jobs here. *RP 254 at 18-22.* Indeed, Angelika's mother did move in with Angelika during this time. *RP 173 at line 8.* Suddenly, Angelika had no more need for child care and she let Laurel McNaught go. AJM's contact with her Nana was reduced. *RP 1129 at 1-4.*

Developmentally, at the age of two, AJM was in her critical bonding years when she forms basic attachments. Dr. Hutchins-Cook observed that AJM is very bonded with each parent. *RP 291 at 13-17.* She had also formed important attachments to her paternal grandparents and her maternal grandmother. *RP 361 at 19-21, 23.* After psychological testing, observation, and interviews with the parents and third parties, Dr. Hutchins-Cook concluded that each parent was skilled and able to parent

AJM. *Exhibit 130 at 17.* Consistent with AJM's developmental level and her need for gradual changes, Dr. Hutchins-Cook recommended a gradually shifting residential schedule that reached a 50/50 schedule by the time the child was 5 years old. *Exhibit 130 at 19.* Dr. Hutchins-Cook recommended strategies to reduce the emotionality of child exchanges and to help the parties better co-parent. *RP 1186 at 21-25; 1187 at 105.*

She did not address, nor had she evaluated, the relocation issue because Angelika had agreed that relocation was off the table. *RP 255 at 10.* Her report was issued to the parties on April 25, 2014. *Exhibit 130.*

One month later, six weeks before trial, and two weeks before the close of discovery, Angelika served on Byron a new Notice of Intent to Relocate. *Exhibit 156.* She did not intend to change her employment. *RP 78 at 4-10.* That was because she could work from home. *RP 78 at 4-10.* Instead, Angelika testified extensively at trial about her conflict with Byron and secondarily, how much nicer the homes in Texas were compared to Washington. *RP 443-45*, 458 Yet her own financial declaration appeared to show she could not afford home ownership. *Exhibit 7.* Indeed, the parties rented during the marriage and the evidence showed that it would most likely continue. *CP 594.*

Byron could not relocate to Texas. The maintenance and child support he had agreed to pay Angelika was based upon his Seattle salary.

CP 569. He had never earned the kind of salary in Texas that he earns here. *RP 73 at 12-14; CP 569.*

AJM was only two years old at the time of trial. Dr. Hutchins-Cook testified that relocating AJM so far away at such a young age would transform the parent/child relationship to a visitor relationship. *RP 293 at 19-20.* Effectively, AJM would lose her father. *RP 392 at 18-19.*

Byron offered evidence that he planned to stay on Mercer Island and that the schools on Mercer Island were among the best. *Exhibit 130 at 159 (#84); RP 1252 at 13-15.* He showed that AJM had toddler classes here, and that the plethora of activities available to AJM in Seattle were comparable in price to the activities available to her in Texas. *RP 413 at 1-13; Exhibit 159.*

In the end, the trial court entered cursory findings that evidenced little consideration of the factors and relied heavily on the presumption that Angelika's relocation would be permitted. CP 535-41. It then summarily adopted Angelika's plan. *CP 539, 542.* It denied Byron's motion for stay. *CP 698.* His motion for stay to the Court of Appeals was similarly denied.

After briefing and oral argument in this case was completed, Division One issued its opinion in *Larson v. City of Bellevue,* a civil case, and then conclusorily held, without additional briefing or opportunity to be heard, that the same rule regarding presumptions applied in this case.

Its reasoning relied heavily on the presumption that a "fit parent acts in the best interests of her child"[1] without acknowledging that where both parents are fit, they both are equally entitled to that presumption. In so doing, the court derogated from its own historic law and now conflicts with the law set forth by Division Two. The application of the presumption announced by Division One violates Byron's right of trial before a judge under Articles 1 and 4 of the Washington Constitution, as well as his right of Due Process under the 14th Amendment. The presumption adopted by Division One has the effect of encouraging relocation by allowing one parent to truncate parenting disputes in the dissolution of marriage actions by simply moving away. It leaves the children of Washington State unnecessarily vulnerable to the additional loss of a parent, after they have already experienced the loss of an intact family upon divorce. This petition follows.

V. ARGUMENT

1. Imposing Presumption before Final Parenting Plan Entered in a Dissolution of Marriage Action Violates Right of Due Process. RCW 26.09.184 and .187 mandate the careful consideration of the best interests of the child when determining a final parenting plan upon dissolution of marriage. These statutes place greatest weight on the relative relationship of child with each parent, not day to day childcare. RCW. 26.09.

187. *See also, In re Marriage of Kovacs,* 121 Wn.2d 795, 809, 854 P.2d 629 (1993) (Primary residential parent given no preference when forming a final parenting plan). They are consistent with the legislative policy articulated in RCW 26.09.002 of the fundamental importance of the parent-child relationship to the welfare of the child. They also reflect the fundamental liberty interest parents have in the care, custody, and management of their child. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388 (1982) (Termination of parental rights requires clear, cogent and convincing evidence). That right does not erode simply because one parent has provided a greater proportion of the day to day care of the child. *See RCW 26.09.187(3)(a) and (3)(a)(i), (iii)*. Regardless of status as a non-primary care parent, that parent continues to retain a vital interest in preventing the destruction of a relationship with his or her child. *See* Santosky, 455 U.S. at 758.

This fundamental right has been interpreted to mean that parents must have full access to the courts with a meaningful opportunity to be heard. *Bay v. Jensen* 147 Wn. App. 641, 656, 196 P.3d 753 (2008) (Restricting father's right to enforce parenting plan until court ordered sums paid violated right of due process.). The Wyoming Supreme Court has held that access to courts is insufficient where issues are decided by a judge in an unreported hearing. *Matter of SAJ*, 942 P.2d 407, 409-10 (Wyo.1997). In *SAJ,* Wyoming Supreme Court explained:

> One of the basic elements of due process is the right of each party to be apprised of all the evidence upon which an issue is to be decided, with the right to examine, explain or rebut such evidence. And, the right to hear and controvert all evidence upon which a factual adjudication is to be made *includes the right to hear and cross-examine witnesses.*

Matter of SAJ, 942 P.2d at 409-10 (Wyo.1997). [emphasis added].

In this case, the parties were involved in a dissolution of marriage action where no final parenting plan had been decided under RCW 26.09.184, .187. A hearing for temporary parenting plan was held in which the goal was to enter a temporary plan that causes the least disruption to a child's stability while the action is pending.[2] RCW 26.09.194. A court commissioner entered a plan based upon affidavits limited in page number and argument of counsel limited to 5 minutes per side. KCLFLR 6(e)(f). It gave temporary primary care to Angelika and ordered an evaluation by Dr. Wendy Hutchins-Cook to evaluate, *inter alia,* the parties' competing parenting allegations.

At trial, the court should have disregarded the temporary plan and applied RCW 26.09.187 to independently determine the primary parent, if any. Thereafter, it could have determined the relocation issue. Instead, the court relied on RCW 26.09.405, 520 and summarily adopted the temporary

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[2] A court may not use a temporary parenting plan as a basis from which to adopt a final parenting plan. *In re Marriage of Kovacs*, 121 Wn.2d 795, 809, 854 P.2d 629 (1993)(Primary residential parent given no preference when forming a final parenting plan).

parenting plan as conclusively establishing Angelika as the primary residential parent entitled to the presumption of relocation. Thereafter, it relied on the presumption to grant the relocation.

Byron had no notice that the temporary order of a commissioner would effectively become the final determination of who would be the primary residential parent of their child. He had no meaningful opportunity to be heard on a right as fundamentally important as parenting. The trial court's reliance on a temporary order -- based upon incomplete evidence, no live testimony, and no opportunity for cross examination -- that Angelika was the primary residential parent entitled to the presumption in favor of relocation, violated Byron's right of access to a judge under Article 1, §3 and Article 4, §23 of the Washington Constitution, and his right of due process under the 14th Amendment. The judgment should be reversed.

2. Presumption as Applied by Division One Violates Equal Protection Clause. The equal protection clause under the state and federal constitutions guarantee that people similarly situated under the law will receive similar treatment from the State. Article 1, §3 Washington Constitution; *State v. Schaaf,* 109 Wn.2d 1, 17, 743 P.2d 240 (1987). To establish an equal protection violation, a party must first show that the unequal treatment is directed towards two similarly situated people. *Cosro, Inc., v. Liquor Control Bd.* 107 Wn.2d 754, 760, 733 P.2d 539 (1987).

In this case, both Byron and Angelika are parents with equal

fundamental rights to the care, custody and control of their child. In a dissolution of marriage proceeding, a trial court must use the "best interests" standard when making an initial primary residential placement. *In re Marriage of Pape*, 139 Wn.2d 694, 715, 989 P.2d 1120 (1999), *citing* RCW 26.09.187(3). It is only in a modification action, that a court presumes the best interests of the child require the primary placement remain intact. *Pape*, 139 Wn.2d at 715. RCW 26.09.260(1).

Yet Division One not only applied the presumption in the context of a dissolution of marriage action, it also reasoned that a non-primary residential parent bears both the burden of production and the burden of persuasion in a relocation action because "a fit parent is presumed to act in the best interests of her child." *McNaught, at* 3. This rule was derived from a case involving a parent and non-parent. *See, In re Parentage of C.A.M.A.,* 54 Wn.2d 52, 62, 109 P.3d 405 (2005). By contrast, this case involves two parents with equal rights under the law. That Division One would apply this presumption only to Angelika and not presume that Byron, as a fit parent, is also acting in the best interests of his child belies its bias and constitutes unequal treatment of two similarly situated parties. The presumption should not have applied before an initial parenting plan was determined under RCW 26.09.187. Thereafter, the presumption should have imposed a burden of production only, because both fit parents are presumed to act in the best interests of their children.

3. Divisions Conflict in Applying Presumptions in Context of Parenting. The application of presumptions under Washington law is not clear and in the context of parenting, the Divisions disagree about how they are to be applied. In *In re Estate of Langeland,* Division One stated:

> This lack of clarity exists, at least in part, because Washington cases apply the Thayer theory to some, but not all, presumptions and provide no general rule about when it applies. Other cases identify presumptions that shift the burden of proof. To further complicate the problem, the quantum of evidence required to overcome a burden-shifting presumption varies, and Washington cases do not provide any general guidelines or standards. As a result, "the subject of presumptions is one of impossible difficulty for lawyers, and trial judges as well."

In re Estate of Langeland, 177 Wn. App. 315, 321, 312 P.3d 657 (2013), citing 5 Tegland, § 301.14, at 238.

Historically, Division One was consistent in its application of presumptions in the context of family law. In *Bank of Washington v. Hilltop Shakemill, Inc.,* the court first underscored that a presumption is not evidence, but that rather, the purpose of a presumption is to establish which party has the burden of first producing evidence. *Hilltop Shakemill, Inc.,* 26 Wn. App. 943, 946, 948, 614 P.2d 1319 (1980). (Debtor rebutted presumption that debt was community in character). Once the opposing party has produced evidence to overcome the presumption, the trial court must then discard the presumption, evaluate the evidence presented by both

parties, and reach its conclusion. *Hilltop Shakemill, Inc.,* 26 Wn. App. at 948. Division One applied this burden-shifting presumption in the context of community property law, a presumption that must be rebutted with clear, cogent, and convincing evidence. *In re Marriage of Chumbley,* 150 Wn.2d 1, 5, 74 P.3d 129 (2003).

The treatment of the presumption by Division One in *Hilltop Shakemill,* is consistent with how it has been applied by Division Two in the context of parenting. In *In re Welfare of C.B.,* Division Two held that where a parent's Constitutional rights are at issue, a statutory presumption requires a parent to assume the burden of production, but not the heavier burden of persuasion. *In re Welfare of C.B.,* 134 Wn. App. 942, 955, 43 P.3d 846 (2006) (State bears burden of persuasion in termination proceedings).

Until now, there has been no guidance in applying the presumption contained in the Child Relocation Act. RCW 26.09.520. This is particularly so in the context of a dissolution of marriage action, where no final parenting plan has yet been entered under RCW 26.09.184, .187. Under the RCW 26.09.520, a court presumes in the context of modification that the intended relocation of a child by a primary residential parent will be permitted. That is consistent with the reasoning of this Court in *Pape,* that the initial determination of the best interests of the children has already been made. *Pape,* 139 Wn.2d at 715.

But while all presumptions are rebuttable, the Legislature

emphasized it by expressly characterizing the presumption as "rebuttable." RCW 26.09.520. Thus, the primary residential parent enjoys the presumption that the best interests of the child are served by remaining with that parent. This presumption imposes on the objecting parent the burden to demonstrate that the harm to the child outweighs the benefit of relocation to the child and the relocating parent. *In re Marriage of Horner*, 151 Wn.2d 884, 895, 93 P.3d 124 (2004); RCW 26.09.520. That showing is made by a preponderance of the evidence. *In re Marriage of Wehr,* 165 Wn. App. 610, 613, 267 P.3d 1045 (2011) (Parent successfully rebutted presumption of relocation).

But once a parent has produced the requisite evidence, the function of the presumption has been satisfied and should be discarded, consistent with the "fundamental importance of the parent-child relationship" as expressed in RCW 26.09.002 and as Constitutionally mandated to ensure equal treatment of parents under the law. This is also consistent with the historical application of presumptions in the context of family law in both Division One and Division Two.

But that is not what Division One held. Instead, after this case had been fully briefed and the court had heard oral argument, it decided *Larson v. Bellevue,* involving the application of a presumption in a civil case. *Larson v. City of Bellevue,* -- P.3d -- (2015 WL 4204116). Without requesting any additional briefing or argument in this case, it then conclusorily adopted the

same rules of presumption to this case. In *Larson v.City of Bellevue,* Division One held that, based upon its review of legislative policy, the city retained both the burden of production and the burden of persuasion to show that the occupational disease suffered by Larson was not attributable to his work as a firefighter. *Larson,* -- P.3d at 7.

The court, with little analysis, then summarily held in this case, that in the context of a dissolution of marriage proceeding, where no final parenting plan has yet been considered or entered, an objecting parent retains both the burden of production and the burden of persuasion to show that the detriment of a relocation outweighs the benefit to the child and relocating party. In so doing, it engaged in no meaningful analysis of its deviation from precedent or the Constitutional implications involving both parents. *McNaught,* at 3.

Instead, it avoided the issue by characterizing Byron's argument as "mechanical" and relying on the inapposite presumption that "a fit parent is presumed to act in the best interests of *her* child," [emphasis added]. *McNaught,* at 3. But this quoted presumption arises from cases involving a parent and non-parent. *See, In re Parentage of C.A.M.A.,* 54 Wn.2d 52, 62, 109 P.3d 405 (2005). In this case, both parents are fit parents and both are therefore presumed to be acting in the best interests of their child.

In this case, Division One applied the presumption in the context of a dissolution of marriage, not modification action. But then, it went further.

Instead of interpreting the presumption that would preserve a balanced approach to the issue, it put its thumb on the scale of the relocating parent to accord greater preference than the statutory scheme envisions. This is contrary to legislative intent. Division One failed to appreciate that a rule appropriate in a civil context involving parties of unequal footing, does not apply in the context of family law, where the Constitutional rights of both parents are equal and the best interests of the child is squarely before the court. In effect, the court's decision converted the presumption under RCW 26.09.520 into conclusive evidence that is virtually unrebuttable.

The effect is well illustrated by the facts of this case. The relocation presumption operated to allow the relocation where a) the parties' two year old child would essentially lose her father if relocated (RP 392 at 18); b) the mother wanted to move because she subjectively considered the father to be harassing; and c) the mother would consider no other less expensive place in Washington to live other than on Mercer Island. Her employment would not change. Byron could not also relocate because he was required to support her based upon his Seattle income. If a parent can relocate for these reasons, with these consequences, there are few, if any relocations a trial court could restrain.

4. Division One Extends Law to Detriment of Washington Citizens. In *In re Marriage of Pape,* the seminal case from which the relocation statute was codified, this Court addressed plainly the thorniness of

the relocation issue. It acknowledged that the interests of a primary residential parent in moving are pitted a) against those parents who will be left behind, as well as b) potentially the interests of the child, which may or may not conflict with the interests of one or both parents. *Pape,* 139 Wn.2d at 706, *citing* Tropea, 87 N.Y.2d at 736, 642 N.Y.S.2d 575, 665 N.E.2d 145; *Ireland v. Ireland,* 246 Conn. 413, 421, 717 A.2d 676 (1998). This Court also recognized in the context of relocation, there are times when one parent's proffered move is really "a pretext for minimizing the child's contact with the parent, who will be left behind." *Pape,* 139 Wn.2d 694, 717, 989 P.2d 1120 (1999).

In addressing how to resolve the issue, this Court relied both on Washington's statutory scheme as well as the prevailing social science of the day. *Pape,* 139 Wn.2d at 708-09. It stated that the controversy over its evolving decisions regarding relocations constituted:

> a "serious gap" between popular perceptions as to what is in a child's best interests and a growing body of social science literature that has identified the child's relationship with his or her primary caretaker as the single most important factor affecting the child's welfare, when the child's parents do not live together.

Pape, 139 Wn.2d at 708. This Court went on to harmonize this science with RCW 26.09.260, which emphasizes "custodial continuity" in the context of modification actions, after the best interests of a child have already been determined in a divorce. *Pape,* 139 Wn.2d at 709.

Ultimately, this Court in *Pape,* articulated a rule that addressed both a relocating parent's potential for self-interest as against the prevailing wisdom of the day that children do best when they remain with their primary residential parent. Specifically, this Court held, *inter alia,* that a parent proposing to relocate must show a bona fide reason for the move, such as a change in employment or educational opportunity. *Pape*, 139 Wn.2d at 716. To restrict the move, the objecting parent must show that the reason is not bona fide and further that, consistent with the conclusions of social science that staying with the primary parent would ensure the wellbeing of the child, the relocation would cause detriment to the child beyond the infrequent contact with the non-relocating parent. *Pape*, 139 Wn.2d at 717.

The holding of *Pape* was largely codified in what is now the Child Relocation Act. RCW 26.09.405 *et. seq*. Inherent in the CRA is the presumption that a child's relocation with the primary parent will serve that child's best interests. RCW 26.09.520. But in the intervening 16 years since the decision was announced and a full 20+ years since the social research upon which the decision was based was published, new research has shown the social findings to be simplistic and detrimental when applied as a bright line rule. Specifically, much of the underlying data upon which the research was based centered on a relatively small number of middle-class, white families, already seeking psychological therapy, where no inquiry was made about families of different ethnicities or socio-economic status. *A Study of*

Post-Separation/Divorce Parental Relocation, Department of Justice, Canada (2015), p. 4.

Most researchers today now accept that post-separation relocation is a "risk factor" for children and that on certain measures, children, who relocate after separation have more difficulties than children, who do not. *Post-Separation/Divorce Parental Relocation,* at 12. Most mental health professionals do *not* advocate a legal presumption, but rather consideration on a case by case weighing of risks and benefits. *Post-Separation/Divorce Parental Relocation,* at 13, *citing,* (Austin, 2008; Kelly & Lamb, 2003; Kelly, 2007; Stahl, 2006; Waldron 2005). In response, the majority trend in American courts is to move towards a best interests of the child standard with no presumptions. *A Move in the Right Direction? Best Interests of the Child Emerging as the Standard for Relocation Cases,* Linda D. Elrod, p. 29.

Parental relocation is one of the knottiest and most disturbing problems in family law. *Pape,* 139 Wn.2d at 706. According to a study commissioned in Australia, approximately 6 percent of family law cases require a judicial disposition. *A study of Post-Separation/Divorce Parental Relocation,* Department of Justice, Canada, p. 3 (2015), *citing,* Parkinson & Cashmore, 2009. But when the issue of relocation arises, the percentage jumps to a full 59% of cases that must be decided by a court. *Post-Separation/Divorce Parental Relocation,* p. 3. In New Zealand, 51 percent of relocation cases are litigated (Taylor et al., 2010). In Washington, our

courts have recognized that extended litigation is harmful to children. *In re Marriage of Jannot,* 149 Wn.2d 123, 127, 65 P.3d 664 (2003). Our rules of law should promote the settlement of issues between parents; they should not intensify them.

The rule announced by Division One leaves it unlikely that a non-relocating parent can successfully restrain a move. The unintended effects are that all parenting disputes will now be converted into potential relocation cases. Every parent, facing loss of his or her child in a potential future relocation, will fight for initial 50/50 care to avoid this presumption in the future. Or, a parent wanting to ensure the right to move, will refuse to settle for anything less than primary care in order to enjoy the presumption in the future. Where before, settlement of parenting issues was the norm, now, virtually every case will be a potential relocation case, with the increased litigation that attends the issue. Those litigants with means will have counsel. For those who cannot afford the cost of attorneys and experts, trial courts will be besieged with *pro se* parents.

The antiquity of the social science underlying Division One's application of the presumption is illuminated when considered in the context of currently recognized family structures. No longer are we a society where we recognize family as a mother with a father as an also-ran. Nuclear families with two mothers or two fathers are also recognized. Both parents, regardless of gender, are essential components of a child's development, in

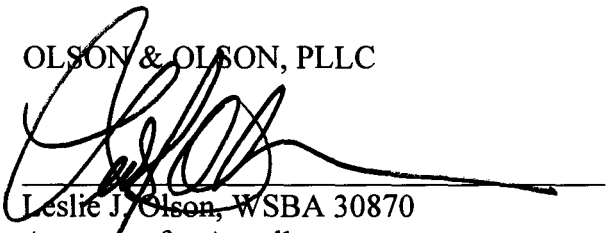
the context of emotional adjustment, attachments, behavioral and intellectual functioning. The simplistic view that "happy mother equals happy child" puts children unnecessarily at risk and does a great harm to the families of Washington. The impact of the rule announced by Division One is that litigation involving parenting plans will increase dramatically and the consequences of such divisive litigation will be borne by our most vulnerable citizens: our children and our parents of limited economic means.

5. CONCLUSION

This case should be reversed and remanded for proceedings consistent with the Court's opinion. The presumption in RCW 26.09.520 should not apply before an initial final parenting plan determining the primary residential status of a parent has been entered based upon consideration of the factors under RCW 26.09.187. Thereafter, the presumption should be applied to require the objecting party to bear the burden of production. Once that burden has been met, the trial court should discard the presumption consistent with the social policy embodied in RCW 26.09.002 and the equal Constitutional rights of both parents. A trial court should then consider the evidence with the paramount concern being the best interests of the child.

RESPECTFULLY SUBMITTED this 16th day of September 2015.

OLSON & OLSON, PLLC



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

I am employed at Olson & Olson, PLLC. On ~~September 29, 2014,~~ September 16, 2015 I caused to be delivered the original ~~Motion for Accelerated Review and~~ Petition for Review to the Supreme Court ~~Stay~~ and Certificate of Service to:

Clerk of the Court, Court of Appeals, Division I
Via ~~Facsimile: (206)389-2613~~ Messenger

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Signed at Seattle, Washington this 16th day of September, 2015.

Greg Hardgrave

APPENDIX A

2015 WL 4885752
Only the Westlaw citation is currently available.
Court of Appeals of Washington,
Division 1.

In the Matter of the MARRIAGE OF
Angelika McNAUGHT, Respondent,
and
Byron McNaught, Appellant.

No. 72343-0-I. | Aug. 17, 2015.

Synopsis

Background: Mother, who had filed petition for dissolution of marriage, sought permission to relocate out of state with child. The Superior Court, King County, Richard D. Eadle, J., allowed mother and child to relocate out of state. Father appealed.

Holdings: The Court of Appeals, Leach, J., held that:

[1] Child Relocation Act did not result in a shifting of the burden of persuasion to parent seeking to move with child when presumption that a fit parent acts in his or her child's best interest is rebutted;

[2] evidence supported order allowing mother to relocate out of state;

[3] parenting time order, which provided that father could not designate other caretakers during his residential parenting time, was an abuse of discretion; and

[4] order awarding mother a portion of her reasonable attorney fees and costs in amount of $15,000 was not an abuse of discretion.

Affirmed in part, reversed in part, and remanded.

West Headnotes (20)

[1] **Constitutional Law**
Parent and Child Relationship

Parental rights constitute a protected, fundamental liberty interest under the Fourteenth Amendment to the United States Constitution. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[2] **Child Custody**
Joint Custody

The Court of Appeals reviews a trial court's parenting plan decision for an abuse of discretion.

Cases that cite this headnote

[3] **Child Custody**
Joint Custody

A court's parenting plan decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Cases that cite this headnote

[4] **Child Custody**
Removal from Jurisdiction

If a person entitled to residential time or visitation objects to a child's relocation, the person seeking to move the child may not relocate the child without court approval. West's RCWA 26.09.480(2).

Cases that cite this headnote

[5] **Child Custody**
Removal from Jurisdiction

Upon a proper objection, a trial court must conduct a fact-finding hearing on the proposed move out of state with a child. West's RCWA 26.09.520.

Cases that cite this headnote

[6] **Child Custody**

Removal from Jurisdiction

Child Custody

Burden of Proof

Child Relocation Act did not result in a shifting of burden of persuasion to parent seeking to move with child when presumption that a fit parent acts in his or her child's best interest is rebutted; rather, the Act imposes burdens of persuasion and production on parent opposing relocation. West's RCWA 26.09.520.

Cases that cite this headnote

[7] **Statutes**

Presumptions, Inferences, and Burden of Proof

Courts interpret statutory presumptions to give them the force intended by the legislature.

Cases that cite this headnote

[8] **Child Custody**

Removal from Jurisdiction

A trial court must consider all 11 statutory factors in child relocation matters to determine if a detrimental effect outweighs the benefits to both the child and the parent wishing to relocate. West's RCWA 26.09.520.

Cases that cite this headnote

[9] **Child Custody**

Removal from Jurisdiction

Each statutory child relocation factor has equal importance, and they are not weighted or listed in any order but rather provide a balancing test between the competing interests and circumstances that exist when a parent wishes to relocate. West's RCWA 26.09.520.

Cases that cite this headnote

[10] **Child Custody**

Removal from Jurisdiction

Child Custody

Decision and Findings by Court

Trial court must enter specific findings on each statutory child relocation factor, or parties must have presented substantial evidence on each factor with trial court making findings and oral articulations that reflect its consideration of each. West's RCWA 26.09.520.

Cases that cite this headnote

[11] **Child Custody**

Removal from Jurisdiction

A trial court abuses it discretion when it fails to consider each statutory child relocation factor. West's RCWA 26.09.520.

Cases that cite this headnote

[12] **Child Custody**

Removal from Jurisdiction

Evidence supported order allowing mother to relocate out of state with child; mother had no family in state and wanted to move to Texas to be closer to family, mother originally indicated that she would not move out of state as her parents were planning to move to state, but when her parents' plans fell through, she decided to relocate to Texas, mother had friends in Texas she visited regularly, housing costs were less in Texas, and mother would be able to purchase a home in Texas but could not purchase one in state. West's RCWA 26.09.520.

Cases that cite this headnote

[13] **Child Custody**

Physical Custody Arrangements

A trial court has broad discretion to structure a parenting plan, guided by the provisions of the applicable statutes.

Cases that cite this headnote

[14] **Child Custody**

Conditions

Parenting time order, which provided that father could not designate other caretakers

during his residential parenting time, was an abuse of discretion; father was found to be a competent person to care for child, and thus, his designation of time to his relatives was a normal right of parental decision making, and no evidence supported the limitation. West's RCWA 26.09.191(3)(a)–(f).

Cases that cite this headnote

[15] **Child Custody**

Right to Control Child in General

Ordinary parental decision-making rights include designating family members to care for one's child.

Cases that cite this headnote

[16] **Child Custody**

Notice to Custodial Parent

Trial court abused its discretion when it required father, in parenting time order, to provide a 45–day notice to mother for his monthly visits, a 60–day notice after child began school, and an eight-month notice for winter break travel plans; mother testified that 30 days was reasonable notice, and no evidence supported court's notice requirements.

Cases that cite this headnote

[17] **Child Custody**

Holidays

The trial court's parenting plan order that limited father's holiday visits in Texas to the day of the holiday between the hours of 10 a.m. and 8 p.m. was not an abuse of discretion; father could schedule his residential time in Texas to include major holidays, and the limitation for special occasions allowed both mother and father to celebrate with child without disrupting child's schedule.

Cases that cite this headnote

[18] **Child Custody**

Physical Custody Arrangements

The trial court's parenting time order that limited father's video chat time with child to one or two times per week was not an abuse of discretion; the order provided father with semiregular contact with child, and avoided burdening mother with scheduling more frequent contact while providing childcare and implementing schedules.

Cases that cite this headnote

[19] **Child Custody**

Transporting and Transferring Child

Trial court's order providing for a proportional division of the costs of airfare for visitation in Texas alone was not an abuse of discretion, even though, as argued by father, the order left father responsible for additional expenses associated with his trips such as room and board and car rental; father had a brother living in Texas, and he had a sister who lived with a boyfriend in a town close to where mother was relocating with child. West's RCWA 26.19.080(3).

Cases that cite this headnote

[20] **Child Custody**

Attorney Fees

Order awarding mother a portion of her reasonable attorney fees and costs in amount of $15,000 was not an abuse of discretion, in dissolution of marriage proceeding in which mother sought to relocate with child out of state; father had an annual salary of $140,000 per year, mother had an annual salary of $40,000 per year, mother had already spent $30,000 of her savings on attorney fees, father testified that his income would grow by as much as $4,000 per month that year, and father only had to provide maintenance for 36 months. West's RCWA 26.09.140.

Cases that cite this headnote

Appeal from King County Superior Court; Hon. Richard D. Eadie, J.

Attorneys and Law Firms

Craig Jonathan Hansen, Hansen Law Group, Bellevue, WA, for Respondent.

Leslie Jean Olson, Olson & Olson PLLC, Seattle, WA, for Appellant.

PUBLISHED OPINION

LEACH, J.

*1 ¶ 1 Byron McNaught appeals the trial court's relocation order allowing Angelika McNaught and their daughter, A.J.M., to move to Texas. He challenges the trial court's application of the relocation presumption, the trial court's evaluation of the statutory relocation factors, and the sufficiency of the evidence to support the trial court's relocation decision. Additionally, he makes legal challenges to certain parenting plan provisions. Finally, he challenges the trial court's award of attorney fees to Angelika and asks this court not to award her fees on appeal.

¶ 2 Because the relocation presumption reflects a legislative policy decision and Washington case law requires a quantum of proof to rebut it, this presumption shifts the burdens of production and persuasion to the parent opposing the relocation. The trial court correctly applied the presumption.

¶ 3 The record includes evidence addressing each relevant relocation factor, and the trial court's findings reflect its consideration of each factor. Substantial evidence supports these findings and the trial court's relocation decision. But the evidence does not support the parenting plan notice provisions. And, because a parent may delegate its residential time to family members absent any indication of harm to a child, the trial court abused its discretion by denying Byron this discretion. Byron's other challenges to the parenting plan lack merit. Because Byron earns significantly more than Angelika, we conclude that the trial court did not abuse its discretion when it awarded Angelika attorney fees. We affirm in part, reverse in part, deny fees to both parties, and remand for further proceedings consistent with this opinion.

FACTS

¶ 4 Angelika and Byron McNaught met in Texas and married there in 2004. In 2010, they moved to Seattle, so Byron could take a job. Angelika began a web design position, allowing her to work from their home on Mercer Island. They had a child, A.J.M., in February 2012. As an infant, A.J.M. woke up four or five times per night, leaving both parents, especially Angelika, sleep deprived. Byron's parents moved from Florida to Mercer Island, and Byron's mother, Laurel McNaught, provided childcare to A.J.M. A.J.M. and Byron's parents became close. But in the months after A.J.M.'s birth, Byron and Angelika's marriage began to have difficulties. Angelika criticized Byron for the social time he spent with coworkers and pursuing hobbies and believed that the time he spent away from home indicated that he did not want to parent.

¶ 5 In June 2013, Angelika and Byron separated. Angelika petitioned for dissolution of marriage.

¶ 6 On July 12, 2013, Angelika filed a motion for temporary orders allowing her to relocate A.J.M. to Texas, where her family lives. The trial court denied her request. It also appointed Dr. Wendy Hutchins–Cook to make recommendations about a parenting plan and the relocation issue. The trial court ordered that A.J.M.'s childcare by Laurel McNaught continue but provided Angelika the option for Laurel McNaught to provide care in Byron's home. By January 2014, Angelika had gradually reduced and then eliminated Laurel's care of A.J.M.

*2 ¶ 7 Between January and April 2014, Dr. Hutchins–Cook performed psychological testing, observed A.J.M. with each parent, and conducted interviews with the parents and third parties. She issued her report on April 21, 2014. Angelika reported to Dr. Hutchins–Cook that she did not plan to relocate, though she wanted to be near her family, because the trial court had required that she remain in Washington. She said that she had come to realize it was better for A.J.M. to be around her father more and said that she would stay, reporting that her parents closed their restaurant and hoped to buy property in Washington. Angelika's mother temporarily stayed with her and helped with A.J.M.

¶ 8 Dr. Hutchins–Cook concluded that A.J.M. is more reactive and sensitive than other children and fares better with gradual rather than dramatic changes. Dr. Hutchins–Cook found A.J.M. to be well bonded with each parent, finding no concerns with either parent's ability to fulfill parenting functions. She found that Angelika had provided a majority

of A.J.M.'s care. She also found A .J.M. to be attached to Byron's parents and Angelika's mother. Dr. Hutchins–Cook recommended a residential schedule that gradually reached a week-on, week-off schedule by the time A.J.M. turned five.

¶ 9 Dr. Hutchins–Cook did not evaluate the issue of relocation because at the time of evaluation, Angelika did not plan to move. But she did find that A.J.M. had established relationships with relatives in Texas. Before trial, Angelika filed a second notice of intended relocation. Her parents were not able to move to Washington permanently. She stated in her notice that her move would depend on the trial court's decision.

¶ 10 At trial, Angelika, Byron, Dr. Hutchins–Cook, and other witnesses who knew the parents and A.J.M. testified to A.J.M.'s relationship with her parents. Though Dr. Hutchins–Cook did not evaluate the issue of relocation, she did testify about relocation issues.

¶ 11 The trial court allowed the requested relocation and adopted a parenting plan. The trial court denied Byron's motion for stay. After Byron appealed, this court denied a second motion for stay.

STANDARD OF REVIEW

[1] [2] [3] ¶ 12 Parental rights constitute a protected, fundamental liberty interest under the Fourteenth Amendment to the United States Constitution.[1] This court reviews a trial court's parenting plan decision for an abuse of discretion.[2] A trial court abuses its discretion when it makes a manifestly unreasonable decision or bases its decision on untenable grounds or untenable reasons.[3]

> "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." [[4]]

ANALYSIS

Relocation Presumption

*3 [4] ¶ 13 The child relocation act (CRA), RCW 26.09.405–.560, provides notice requirements and standards for changing the primary residence of a child who is the subject of a court order regarding residential time.[5] If a person entitled to residential time or visitation objects to a child's relocation, the person seeking to move the child may not relocate the child without court approval.[6]

[5] [6] ¶ 14 Upon a proper objection, a trial court must conduct a fact-finding hearing on the proposed move.[7] RCW 26.09.520 establishes a rebuttable presumption permitting the move:

> There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person.

¶ 15 This presumption incorporates and gives substantial weight to the traditional presumption that a fit parent acts in his or her child's best interests, including when that parent relocates the child.[8] "The CRA shifts the analysis away from only the best interests of the child to an analysis that focuses on both the child and the relocating person."[9] A person opposing the move must rebut the presumption by a preponderance of the evidence.[10]

¶ 16 Byron contends that this presumption has a limited purpose. It places on the opposing party the burden of producing sufficient evidence to overcome the presumption by a preponderance of the evidence. Once this occurs, the presumption disappears, and the court weighs the evidence without regard to the presumption. Implicit, but unstated, in Byron's argument is the view that rebuttal of the presumption in this manner shifts the burden of persuasion to the person requesting the move. We recently rejected a similar argument in the context of a different statutory presumption.[11]

¶ 17 In *Larson v. City of Bellevue*,[12] we held that a statutory presumption that certain diseases contracted by firefighters were occupational diseases shifted the burdens of production and persuasion. Two factors present in both

Larson and this case persuade us that RCW 26.09.520 places both the burden of production and persuasion on the objecting person. First, this statute reflects a public policy decision made by the legislature favoring relocation. Second, Washington precedent requires a defined quantum of proof (preponderance) to rebut the presumption. Deciding if the evidence produced achieves the necessary level of persuasiveness requires an evaluation of witness credibility and the persuasiveness of all admitted evidence. Logically, this shifts to the objecting person the burden of persuading the court that detriment of the proposed relocation outweighs the benefit of the change to the child and relocating person.[13]

¶ 18 Byron cites *Bank of Washington v. Hilltop Shakemill, Inc.*,[14] to support his position. In *Hilltop,* this court held that the trial court must disregard a presumption of a community debt once the debtor presents evidence to overcome the presumption.[15] Byron argues that consistent with the provisions and policy of the CRA, the trial court should have applied the relocation presumption in the same way. He claims that retaining the presumption after the objecting person has rebutted it impermissibly elevates one parent's fundamental parenting right over that of the other parent. But this mechanical argument fails to address that the CRA's presumption of relocation " 'incorporates and gives substantial weight to the traditional presumption that a fit parent will act in the best interests of her child.' "[16] As Division Two of this court has concluded, the preponderance of the evidence standard of proof required to overcome the presumption adequately protects the interests of both parents.[17]

*4 [7] ¶ 19 Courts interpret statutory presumptions to give them the force intended by the legislature.[18] The CRA's 11 child relocation factors "serve as a balancing test between many important and competing interests and circumstances involved in relocation matters," while the presumption in favor of relocation operates to give particular importance to the interests and circumstances of the relocating parent, not only the best interests of the child.[19] The significant yet surmountable hurdle the legislature established for the opposing party supports the view that the presumption does not disappear upon a party's production of evidence. If it disappeared as suggested, the presumption would do little to further the legislature's apparent purpose of generally favoring relocation. As we apply the presumption, it provides the standard the trial court uses at the conclusion of trial to resolve competing claims about relocation. This approach furthers the legislature's policy reflected in the presumption.

¶ 20 RCW 26.09.520 shifts the burdens of persuasion and production to a party opposing relocation. The trial court did not err in its application of the statutory presumption.

Court's Consideration of Child Relocation Factors

[8] [9] [10] [11] ¶ 21 Byron next argues that the trial court failed to consider all 11 relocation factors in RCW 26.09.520. A trial court must consider all 11 statutory factors in child relocation matters to determine if a detrimental effect outweighs the benefits to both the child and the parent wishing to relocate.[20] Each factor has equal importance, and they are not weighted or listed in any order but rather provide a balancing test between the competing interests and circumstances that exist when a parent wishes to relocate.[21] The trial court must enter specific findings on each factor, or parties must have presented substantial evidence on each factor with the trial court making findings and oral articulations that reflect its consideration of each.[22] A trial court abuses it discretion when it fails to consider each factor.[23]

¶ 22 The trial court heard testimony from both parents and from Dr. HutchinsCook about the 11 relocation factors. The trial court's findings of fact and conclusions of law stated that it had "considered the factors in RCW 26.09.520, and those factors favor the mother and her preferred relocation to Texas." Because the trial court did not enter specific findings on each factor, we must determine if the court heard substantial evidence on each factor and reflected its consideration of each in its findings and oral articulations.

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

¶ 23 Dr. Hutchins–Cook testified that A.J.M. had strong bonds with both parents, as well as her paternal grandparents and maternal grandmother. She found A.J.M. equally attached to both parents. Dr. Hutchins–Cook also found that Angelika was very good at providing care to A.J.M. and did 75–85 percent of the parenting. Byron testified at trial that he shared parenting responsibilities with Angelika and that both he and Angelika had a strong bond with A .J.M. The trial court considered this factor when it found that A.J.M .' s

relationship with Angelika and her family in Texas is at least as strong as the relationship A.J.M. has with Byron and his family.

(2) ***Prior agreements of the parties***

*5 ¶ 24 Dr. Hutchins–Cook testified that during evaluation Angelika stated she would not relocate but also testified that the parties had made no agreement.[24] This factor is inapplicable.

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

¶ 25 Dr. Hutchins–Cook testified that at A.J.M.'s age, disrupting A.J.M.'s relationship with Angelika is more harmful than disrupting her relationship with Byron. Dr. Hutchins–Cook testified that relocation makes a significant impact on the quality of the relationship but is unlikely to break the attachment of a child to his or her parent. The trial court's finding that the strength of A .J.M.'s relationship to Angelika and her family in Texas is at least as strong as her relationship with Byron and his family reflects the court's consideration of this factor.

(4) ***Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191***

¶ 26 Because neither party alleged harm to A.J.M. under RCW 26.09.191, the court did not need to consider this factor.

(5) ***The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation***

¶ 27 Angelika testified that she wanted to be close to her family and move to a community where she could purchase a home. Byron testified about his close relationship with A.J.M. and his strong concern about her relocation. He thought Angelika may be trying to relocate A.J.M. away from him. During cross-examination, he challenged her assertion that Texas provides a cheaper cost of living and asserted in argument that she changed her position about moving to preclude Dr. Hutchins–Cook from evaluating the relocation issue. Angelika testified that at the time of evaluation, she believed she would not relocate because her parents sold their restaurant and were trying to buy a home in Seattle but later changed her mind when their plans failed.

¶ 28 The trial court addressed Byron's reasons for opposing the relocation in its order denying his motion for stay when it acknowledged that relocation may be disruptive to his relationship with his daughter. But the trial court ultimately adopted Angelika's reasoning, referencing in its order the strong bond between A.J.M. and Angelika's family in Texas, as well as opportunities for A.J.M. and Angelika there.

(6) ***The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child***

¶ 29 Dr. Hutchins–Cook testified that both parents understood A.J.M. to be a sensitive child but that she did not believe A.J.M. had special needs. She testified that if A.J.M. remains, A.J.M. has everything she needs, including both parents. She acknowledges that if A.J.M. moves, it would disrupt her relationship with her father. The trial court's statement in its order denying Byron's motion for stay that Angelika's establishment of a "home with permanence" provided A.J.M. "stability and security" reflects the court's consideration of this factor.

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

*6 ¶ 30 Dr. Hutchins–Cook testified that she believed A.J.M. had everything available to her in the status quo but knew nothing about Angelika's financial or housing situation. Angelika testified that she could not afford to live on Mercer Island once her lease expired, about her ability to buy a home for her and A.J.M. in Texas, and her high quality of life there compared with the less desirable lifestyle she could afford in Seattle. The trial court stated that

> [A.J.M] can look forward to a substantially better housing by granting the motion to relocate. She can expect to enjoy the stability of residence that home ownership usually provides. The community to which Petitioner proposes to move is, by the evidence, rated highly in all categories, most particularly, in the quality of schooling to which she will have access.

While Mercer Island, from which she will move, has high quality schools, she probably could not continue to reside there.

(8) ***The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent***

¶ 31 Dr. Hutchins–Cook testified that she recommends Skype™ (Microsoft Corp. product providing video chat and voice calls from various electronic devices) or FaceTime™ (Apple Inc. product providing video chat and voice calls from various electronic devices) as a useful tool for A.J.M. to communicate with Byron. The trial court included Skype and FaceTime arrangements in its parenting plan. Its order denying Byron's motion for stay also indicated it considered this factor:

> No one questions that the father is dedicated to his child, and she to her father. To the extent that the relocation is disruptive to that relationship, he is in the better position to ameliorate the negative aspects of their separation, by his regular and consistent contact with her, than by denying the benefits to her of the relocation. He does have the resources, and apparently the intent, to continue to see his daughter in Texas, where he, too, has family and roots.

(9) ***The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also***

¶ 32 Angelika testified that while she had always considered relocating, she had tried to stay in Seattle when her parents attempted to move to Seattle. Byron testified that he could not relocate to Texas due to logistical, financial, and professional constraints. The trial court's order reflects its consideration of this factor, finding that Angelika likely was unable to continue living on Mercer Island and would not be able to provide A.J.M. access to desirable resources.

(10) ***The financial impact and logistics of the relocation or its prevention***

¶ 33 Angelika testified that Texas had cheaper housing prices and less expensive activities for A.J.M. In cross-examination, Byron challenged these assertions. The trial court stated in its order that Angelika probably could not continue living on Mercer Island, while in Texas A.J.M. could look forward to substantially better housing.

(11) ***For a temporary order, the amount of time before a final decision can be made at trial***

*7 ¶ 34 This is not applicable to this court's analysis.

¶ 35 The trial court wrote in conclusion, "Considering all the factors of RCW 26.09.520, the very substantial weight of the evidence supports granting Petitioner's motion." Thus, we conclude that the court's findings reflect that it properly considered each of the applicable factors under RCW 26.09.520.

Abuse of Discretion

¶ 36 Byron contends that he demonstrated harm under RCW 26.09.520, reciting his evidence addressing each factor, while arguing that Angelika did not meet her burden. But as Angelika contends, Byron's argument asks this court to reexamine the evidence and reach a different conclusion than the trial court, misapprehending this court's role. We do not review credibility determinations or reweigh the evidence to determine if we should reach a different conclusion, as Byron's argument implies.[25] We review instead for abuse of discretion.[26]

[12] ¶ 37 Byron contends that the court should not have looked at Angelika's close relationship with her family. This ignores the trial court's obligation to consider her interests under RCW 26.09.520.[27] He further claims that Angelika waived the protections of RCW 26.09.530 and that the trial court failed to consider that she would not relocate unless the court allowed A.J.M.'s relocation. But this is not a mandatory factor under RCW 26.09.520, and the court had discretion not to examine that issue. Byron further asserts the court erred as a matter of law when it considered Angelika's interest in buying a home. RCW 26.09.520 permits considering this as a potential benefit to a relocation.

¶ 38 Sufficient evidence supports the court's relocation decision. Angelika testified that when she told Dr. Hutchins–Cook she would not relocate, she based this on the fact that her parents had moved to Seattle. It is important for her to be near her family. When her parents returned to Texas, she had no family in Seattle. She testified, "[I]t's hard to be away from them, especially right now." Angelika also has

friends in Texas and goes back about every six months. And she felt she had no support from Byron's family. Angelika also testified that purchasing a home is important to her and she would be able to do so in Texas, where houses cost less than in Seattle. She testified that A.J.M. could participate in activities at less cost in Texas than in Seattle. In Seattle, Angelika could not save money. Angelika believes A.J.M. should relocate with her because she has provided a majority of the care and A.J.M. goes to her for comfort, guidance, love, and affection. Dr. Hutchins–Cook testified that a relocation does not break attachment between an infant or toddler and his or her long-distance parent, but the quality of the relationship is not as good as when a parent has regular, frequent contact. Dr. Hutchins–Cook testified that at A.J.M.'s age, greater harm would likely come to A.J.M. through disruption of her relationship with her mother than disruption of the relationship with her father.

***8** ¶ 39 Thus, we conclude that because the evidence at trial and the trial court's findings reflect its consideration of all 11 child relocation factors and because sufficient evidence supported the trial court's conclusion that upon consideration of those factors it should grant the relocation, the trial court did not abuse its discretion.

Challenged Terms in Parenting Plan

[13] ¶ 40 Byron challenges several terms of the parenting plan fashioned by the trial court, arguing that the trial court failed to support its findings of fact with substantial evidence, leading to improper parenting plan terms. But, as Angelika argues, a trial court need not support each term of a parenting plan with specific factual findings. Rather, a trial court has broad discretion to structure a parenting plan, guided by the provisions of the applicable statutes.[28] We look at each challenged term, reviewing for abuse of discretion.

[14] ¶ 41 Byron first contends that the trial court abused its discretion when it ordered that Byron could not designate other caretakers. Angelika clarifies that the restriction does not limit Byron's ability to leave the child with others but simply limits his ability to allocate his entire time to another person.

[15] ¶ 42 Ordinary parental decision-making rights include designating family members to care for one's child.[29] A trial court may impose restrictions on parental rights under ROW 26.09.191. But "[a] trial court abuses its discretion if it imposes a restriction that is not reasonably calculated to prevent ... a harm" "similar in severity to the harms posed by the 'factors' specifically listed in RCW 26.09.191(3)(a)-(f)."[30]

¶ 43 The trial court found that "[t]his is father's time to be with the child; he cannot delegate the time to his family, other than when he is physically present in Texas, unless agreed upon between the parents." But, as Byron argues, in this case the trial court did not impose any restrictions under RCW 26.09.191. Byron analogizes to *In re Marriage of Chandola,*[31] a case decided after the trial court's decision in this case. There, the trial court imposed a restriction limiting the paternal grandparents' contact with the child to 20 percent of the father's residential time to encourage the father to directly parent.[32] But the Washington Supreme Court held that absent findings of harm to the child under RCW 26.09.191, those necessary to prevent mental, physical, or emotional harm to the child, the court abused its discretion.[33]

¶ 44 In *In re Marriage of Magnusson,*[34] this court affirmed a trial court's parenting plan that had a provision allowing a fisherman father to designate time to his parents during his absence. Angelika attempts to distinguish *Maqnusson,* arguing that in that case the father had regular residential time and required daycare, where here, if Byron does not go to Texas, then he is not entitled to the time at all. Angelika also argues that allowing Byron to delegate his residential time to a family member conflicts with the U.S. Supreme Court's decision in *Troxel v. Granville,*[35] protecting parental rights against those of third parties.

***9** ¶ 45 We disagree with Angelika's understanding of *Magnusson* and *Troxel.* Byron does have regular residential time with A.J.M. should he choose to use it. And a court presumes that a fit parent acts in the best interests of his or her children.[36] *Magnusson* distinguishes *Troxel* as a case about the competing rights of parents and nonparents. Here, as in *Maqnusson.* where wishes conflict only between two parents, "[i]n the absence of a finding that spending time with ... relatives was against [a child's] best interests," a parent designating time to relatives "simply confirms a normal right of parental decision making."[37] Because no evidence supports the challenged limitation and because the trial court found Byron a competent parent who can take care of A.J.M. and make decisions on her behalf, we conclude that this limitation constitutes an abuse of discretion.

[16] ¶ 46 Byron contends that the trial court abused its discretion when it required him to provide a 45–day notice to Angelika for his monthly visits, a 60–day notice after A.J.M. begins school, and an 8–month notice for winter break travel plans. Angelika testified that 30 days is reasonable notice. Dr. Hutchins–Cook testified, however, that a 15– to 30–day notice is reasonable but that a 60–day notice is unreasonable and too long. Because no evidence supports the trial court's notice requirements, the trial court abused its discretion imposing them.

¶ 47 Byron next contends that the trial court abused its discretion when it concluded that until age 18 A.J.M. may not spend more than three to four days with Byron without interruption by Angelika. If true, his contention might have merit. But Byron has misinterpreted the trial court's residential schedule.

¶ 48 Before A.J.M. reaches school age, the trial court provided Byron a five-day monthly residential schedule. After A.J.M. reaches school age, the residential schedule provides him seven days per month, interrupted by an overnight with Angelika. But the schedule provides different terms for A.J.M.'s winter vacation, other school breaks, and summer vacation. The trial court divides A .J.M.'s winter holiday break in two parts and requires an interruption of Byron's time with A.J.M. only if Angelika travels to Washington with A.J.M. The trial court's parenting plan provides no interruptions when Byron has A.J.M. for her midwinter or spring breaks, when A.J.M. may visit Washington after she begins school. And the trial court imposed a progressive schedule for A.J.M.'s summer vacation. Until A.J.M. turns five and begins school, Byron may have her for up to 10 days and only when Angelika brings A.J.M. to Washington must there be a designated break in the middle. After A.J.M. turns five and begins school but before she turns seven, Byron may have her for two weeks without interruption. And after A.J.M. turns seven, during her summer vacation Byron may have her for an uninterrupted four weeks. And Angelika admits in her appellate brief to this court that she "has no objection, 3–4 years out, to not having the father's time with [A.J.M.] interrupted by the mid-period return to her" under the court's order.

***10** ¶ 49 Because the trial court fashioned a schedule tailored to A.J.M.'s age that provides Byron significant time with his daughter in Washington, we conclude that the trial court did not abuse its discretion when fashioning the terms of the parenting plan's residential schedule.

[17] ¶ 50 Byron further contends that the trial court arbitrarily imposed a restriction in the parenting plan limiting Byron's holiday visits in Texas to the day of the holiday between the hours of 10:00 a.m. and 8:00 p.m. He argues that it serves no purpose other than to limit A.J.M.'s ability to see him. But Byron may schedule his residential time in Texas to include major holidays. And the trial court's schedule for other special occasions, though limited to one day, reflects the court's reasonable allocation of these days to both Angelika and Byron, so each can celebrate with A.J.M. without disrupting A.J.M.'s schedule. Thus, we conclude that the trial court did not abuse its discretion when limiting special occasions to a single day.

[18] ¶ 51 Byron also contends that the trial court abused its discretion by arbitrarily limiting his video chat time with his daughter to one to two times per week when no evidence in the record supported that limitation. But because this provides him semiregular contact with A.J.M. and avoids burdening Angelika with scheduling more frequent contact while she provides childcare and implements schedules, we conclude that this is a reasonable parenting plan term and within the trial court's discretion.

Split of Travel Expenses

[19] ¶ 52 Byron argues that the trial court abused its discretion when it ordered a proportional split of airfare alone, leaving Byron responsible for additional expenses associated with his trips to Texas, including room and board and car rental. RCW 26 .19.080(3) states that long-distance travel costs "to and from the parents for visitation ... shall be shared by the parents in the same proportion as the basic child support obligation." A trial court must apportion these costs.[38]

¶ 53 Angelika argues that the statute's plain language defines the proportional travel expense to include merely airfare and not the cost of living while with a child. An appellate court does not construe a statute's unambiguous language.[39] Here, RCW 26.19.080(3) explicitly requires allocation of travel expenses incurred "to and from" the location and not all costs associated with long-distance visitation.

¶ 54 Additionally, a trial court has discretion to decide what travel expenses are necessary and reasonable.[40] In this case, evidence supports the trial court's conclusion that expenses above airfare were not necessary and reasonable. Byron

testified that he has a brother living in Texas, though the brother planned to move to Seattle in January 2015. Byron also testified that he did not think it would be possible for A.J.M. and him to stay with his sister who lives with her boyfriend near Angelika's proposed town of relocation. But Angelika testified that Byron and his siblings remained close, that he had previously stayed with his brother, and that Byron could potentially stay with his family during visits to see A.J.M. Because Byron has family in Texas and the trial court could have found that air travel was the only necessary and reasonable travel expense, the trial court did not abuse its discretion when it ordered a proportional division of costs for airfare alone.

Attorney Fees

***11** **[20]** ¶ 55 Byron finally argues that the trial court abused its discretion when it awarded Angelika "a portion of her reasonable attorney fees and costs" under RCW 26.09.140 in the amount of $15,000. RCW 26.09.140 allows a trial court to award attorney fees after consideration of the financial resources of each party. A court awards attorney fees under the statute based on need and ability to pay; even if one party has a need, a trial court does not award the fee if the other party does not have the ability to pay.[41]

¶ 56 Byron argues he had no ability to pay, that each party received an equal division of property, and that the maintenance award substantially equalized the parties' respective net incomes. But Byron testified to earning an annual salary of $140,000, with a monthly net income of $8,295. He believed his income would grow perhaps by as much as nearly $4,000 per month that year. His monthly expenses total $5,694. Byron's maintenance obligation to Angelika is $2,250 per month for 36 months. He is also responsible for $841 in child support payments during maintenance and $1,053 in child support payments after maintenance.

¶ 57 Angelika testified that she makes $40,000 per year and had spent $30,000 of her savings in attorney fees, with $40,000 remaining in her savings account. Because of the disparity between Angelika's and Byron's income and earning potential, with Byron far better situated financially, we conclude that the trial court did not abuse its discretion when it awarded reasonable attorney fees and costs to Angelika.

¶ 58 Angelika requests attorney fees under RAP 18.1. Byron objects on the grounds that Angelika did not properly brief the issue. Because Angelika does not devote any argument to the issue, we deny fees under RAP 18.1.

CONCLUSION

¶ 59 Because the relocation presumption shifts the burdens of production and persuasion, the trial court properly applied the presumption. Because the court heard testimony on the RCW 26.09.520 relocation factors and reflected its consideration of the factors in its findings, the court did not abuse its discretion. Because substantial evidence supports the trial court relocation decision, we affirm it. Because a parent may delegate its residential time to family members absent any indication of harm to a child, the trial court abused its discretion by denying Byron this discretion. Because no evidence supports the parenting plannotice requirement, the trial court abused its discretion fashioning these terms. But because a court has broad discretion to fashion a parenting plan, we conclude that the remaining challenged terms fall within the trial court's discretion. Because RCW 26.19.080(3) requires a mandatory proportional split of travel expenses to and from a location and Byron's brother and sister live near Angelika's relocation destination, we conclude that the trial court reasonably required a split for airfare and no other travel expenses. And because evidence reflects that Byron earns more than Angelika and Angelika spent significant savings on attorney fees, the trial court did not abuse its discretion by awarding Angelika attorney fees. We decline to award attorney fees under RAP 18.1. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

WE CONCUR: SPEARMAN, CJ., and SCHINDLER, J.

All Citations

--- P.3d ----, 2015 WL 4885752

Footnotes

1 *In re Marriage of Chandola*, 180 Wash.2d 632, 646, 327 P.3d 644 (2014) (quoting *In re Custody of Smith*, 137 Wash.2d 1, 14–15, 969 P.2d 21 (1998)).

2 *In re Marriage of Littlefield*, 133 Wash.2d 39, 46, 940 P.2d 1362 (1997).
3 *Chandola*, 180 Wash.2d at 642, 327 P.3d 644 (quoting *In re Marriage of Katare*, 175 Wash.2d 23, 35, 283 P.3d 546 (2012)).
4 *In re Marriage of Horner*, 151 Wash.2d 884, 894, 93 P.3d 124 (2004) (quoting *Littlefield*, 133 Wash.2d at 47, 940 P.2d 1362).
5 *In re Marriage of Wehr*, 165 Wash.App. 610, 612, 267 P.3d 1045 (2011).
6 RCW 26.09.480(2).
7 *Wehr*, 165 Wash.App. at 612, 267 P.3d 1045 (citing RCW 26.09.520).
8 *Horner*, 151 Wash.2d at 894–95, 93 P.3d 124 (quoting *In re Custody of Osborne*, 119 Wash.App. 133, 144–45, 79 P.3d 465 (2003)).
9 *Horner*, 151 Wash.2d at 887, 93 P.3d 124.
10 *Wehr*, 165 Wash.App. at 614, 267 P.3d 1045.
11 *Larson v. City of Bellevue*, No. 71101–6–1, 2015 WL 4204116, at *7 (Wash.Ct.App. July 13, 2015).
12 No. 71101–6–I, 2015 WL 4204116, at *7 (Wash.Ct.App. July 13, 2015).
13 *Larson*, 2015 WL 4204116, at *6.
14 26 Wash.App. 943, 946, 948, 614 P.2d 1319 (1980).
15 *Hilltop*, 26 Wash.App. at 948, 614 P.2d 1319.
16 *Horner*, 151 Wash.2d at 895, 93 P.3d 124 (quoting *Osborne*, 119 Wash.App. at 144, 79 P.3d 465).
17 *Wehr*, 165 Wash.App. at 614, 267 P.3d 1045.
18 *Larson*, 2015 WL 4204116, at *7.
19 *Horner*, 151 Wash.2d at 894, 93 P.3d 124
20 *Horner*, 151 Wash.2d at 894–95, 93 P.3d 124 (quoting *Osborne*, 119 Wash.App. at 144–45, 79 P.3d 465).
21 *Horner*, 151 Wash.2d at 894, 93 P.3d 124.
22 *Horner*, 151 Wash.2d at 895–96, 93 P.3d 124.
23 *Horner*, 151 Wash.2d at 894–95, 93 P.3d 124.
24 Byron asserts that an agreement existed because he relied on Angelika's statements to Dr. Hutchins–Cook. But the record fails to support any agreement between the parties on this issue.
25 *See In re Marriage of Fahey*, 164 Wash.App. 42, 62, 262 P.3d 128 (2011): *see also Morse v. Antonellis*, 149 Wash.2d 572, 574, 70 P.3d 125 (2003).
26 *Chandola*, 180 Wash.2d at 642, 327 P.3d 644.
27 *Horner*, 151 Wash.2d at 894, 93 P.3d 124.
28 *Katare*, 175 Wash.2d at 35–36, 283 P.3d 546.
29 *In re Marriage of Magnusson*, 108 Wash.App. 109, 110–11, 29 P.3d 1256 (2001).
30 *Chandola*, 180 Wash.2d at 648, 327 P.3d 644.
31 180 Wash.2d 632, 327 P.3d 644 (2014).
32 *Chandola*, 180 Wash.2d at 641, 327 P.3d 644.
33 *Chandola*, 180 Wash.2d at 658–59, 327 P.3d 644.
34 108 Wash.App. 109, 111, 113, 29 P.3d 1256 (2001).
35 530 U.S. 57, 69–70, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).
36 *Troxel*, 530 U.S. at 69.
37 *Magnusson*, 108 Wash.App. at 113, 29 P.3d 1256.
38 *In re Paternity of Hewitt*, 98 Wash.App. 85, 89, 988 P.2d 496 (1999).
39 *In re Marriage of Scanlon*, 109 Wash.App. 167, 172, 34 P.3d 877 (2001).
40 *Hewitt*, 98 Wash.App. at 89, 988 P.2d 496.
41 RCW 26.09.140; *In re Marriage of Schnurman*, 178 Wash.App. 634, 644–45, 316 P.3d 514 (2013), *review denied*, 180 Wash.2d 1010, 325 P.3d 914 (2014).

End of Document

APPENDIX B

United States Code Annotated
Constitution of the United States
Annotated

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV-Full Text

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this **amendment** is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this **amendment** are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

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APPENDIX C

NOTES OF DECISIONS (2154)

IN GENERAL
CRIMINAL MATTERS

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, **§ 3**

§ 3. Personal Rights

Currentness

No person shall be deprived of life, liberty, or property, without due process of law.

Credits

Adopted 1889.

Relevant Notes of Decisions (13)

View all 2154

Notes of Decisions listed below contain your search terms.

IN GENERAL

Construction with federal law

To the extent that the due process clause of U.S. Const. Art. 6 affords greater protection than does the due process clause of Const. Art. 1, **§ 3** it must prevail; constructions placed by the federal courts upon the federal due process clause should be given great weight, although they are not controlling, with respect to the state due process clause. Olympic Forest Products, Inc. v. Chaussee Corp. (1973) 82 Wash.2d 418, 511 P.2d 1002.

Property, definition

Majority opinions of the United States Supreme Court construing U.S. Const. Amend. 14 are not binding on state courts construing the similar language of Const. Art. 1, **§§ 3**, 12, but such determinations are to be given great weight because the sections are substantially similar in language and purpose. Bowman v. Waldt (1973) 9 Wash.App. 562, 513 P.2d 559.

Vagueness--In general

Due process vagueness challenge cannot succeed merely because a person cannot predict with certainty the exact point at which conduct would be prohibited. U.S.C.A. Const.Amend. 14; West's RCWA Const. Art. 1, **§§ 3**. State v. Riles (1998) 135 Wash.2d 326, 957 P.2d 655. Constitutional Law 3905

---- Purpose of vagueness doctrine

Due process vagueness doctrine under Federal and State Constitutions has a two-fold purpose: (1) to provide the public with adequate notice of what conduct is proscribed, and (2) to protect the public from arbitrary ad hoc enforcement. U.S.C.A. Const.Amend. 14; West's RCWA Const. Art. 1, **§§ 3**. State v. Riles (1998) 135 Wash.2d 326, 957 P.2d 655. Constitutional Law 3905

---- Impossible standards of specificity, vagueness

To withstand due process vagueness challenge, statute is not required to meet impossible standards of specificity or mathematical certainty because some degree of vagueness is inherent in the use of language. U.S.C.A. Const.Amend. 14; West's RCWA Const. Art. 1, **§§ 3**. State v. Riles (1998) 135 Wash.2d 326, 957 P.2d 655. Constitutional Law 3905

---- Burden of proof, vagueness

APPENDIX D

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 4. The Judiciary (Refs & Annos)

West's RCWA Const. Art. 4, § 6

§ 6. Jurisdiction of Superior Courts

Currentness

Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days.

Credits

Adopted 1889. Amended by Amendment 28 (Laws 1951, Sub. H.J.R. No. 13, p. 962, approved Nov. 4, 1952); Amendment 65 (Laws 1977, S.J.R. No. 113, approved Nov. 8, 1977); Amendment 87 (Laws 1993, H.J.R. No. 4201, approved Nov. 2, 1993).

Notes of Decisions (370)

West's RCWA Const. Art. 4, § 6, WA CONST Art. 4, § 6
Current through amendments approved 11-4-2014

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NOTES OF DECISIONS (370)

In general
Administrative decisions
Administrative remedies, exhaustion
Admiralty, federal law
Adoption
Antitrust, federal law
Appeals from other courts
Arbitration
Arrest and search warrants, criminal cases
Assessments, administrative decisions
Bankruptcy, federal law
Certiorari, writs
Civil rights, federal law
Concurrent jurisdiction with other state courts
Construction with other constitutional provisions
Contempt
Contingent jurisdiction
Contract actions
Coram nobis, writs
Court rules
Criminal cases
Determination of jurisdiction
Discretion, writs
Dissolution of marriage
Divisions of superior court
Election contests
Environmental impact statements, administrative decisions
Equity
Exceptions to grant of jurisdiction
Executors, administrators, and personal representatives
Exhaustion of administrative remedies
Fact determinations
Federal law
Forum non conveniens
Fundamental rights, administrative decisions
Guardians
Habeas corpus, writs
Indians
Industrial insurance, administrative decisions
Injunctions, equity
Insolvency
Interference with jurisdiction
Justiciability
Juveniles
Labor relations, federal law
Licenses, administrative decisions
Mandamus, writs
Manner jurisdiction exercised
Marriage, dissolution
Mentally ill persons
Misdemeanors, criminal cases
Municipal ordinances
Naturalization, federal law
Nature of court
Nonjudicial days, open courts
Objections to jurisdiction
Open courts

APPENDIX E

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 4. The Judiciary (Refs & Annos)

West's RCWA Const. Art. 4, § 23

§ 23. Court Commissioners

Currentness

There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision by such judge, to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law.

Credits

Adopted 1889.

Notes of Decisions (43)

West's RCWA Const. Art. 4, § 23, WA CONST Art. 4, § 23
Current through amendments approved 11-4-2014

End of Document

NOTES OF DECISIONS (43)

In general
Family law commissioners
Multi-county districts
Powers and duties
Pro tempore commissioners
Remand
Revision by judge
Scope of review
Writ of prohibition

APPENDIX F

26.09.184. Permanent parenting plan
West's Revised Code of Washington Annotated Title 26. Domestic Relations Effective: July 22, 2007 *(Approx. 3 pages)*

West's Revised Code of Washington Annotated
Title 26. Domestic Relations (Refs & Annos)
Chapter 26.09. Dissolution Proceedings--Legal Separation (Refs & Annos)

Effective: July 22, 2007

West's RCWA 26.09.184

26.09.184. Permanent parenting plan

Currentness

(1) OBJECTIVES. The objectives of the permanent parenting plan are to:

(a) Provide for the child's physical care;

(b) Maintain the child's emotional stability;

(c) Provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for future modifications to the permanent parenting plan;

(d) Set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria in RCW 26.09.187 and 26.09.191;

(e) Minimize the child's exposure to harmful parental conflict;

(f) Encourage the parents, where appropriate under RCW 26.09.187 and 26.09.191, to meet their responsibilities to their minor children through agreements in the permanent parenting plan, rather than by relying on judicial intervention; and

(g) To otherwise protect the best interests of the child consistent with RCW 26.09.002.

(2) CONTENTS OF THE PERMANENT PARENTING PLAN. The permanent parenting plan shall contain provisions for resolution of future disputes between the parents, allocation of decision-making authority, and residential provisions for the child.

(3) CONSIDERATION IN ESTABLISHING THE PERMANENT PARENTING PLAN. In establishing a permanent parenting plan, the court may consider the cultural heritage and religious beliefs of a child.

(4) DISPUTE RESOLUTION. A process for resolving disputes, other than court action, shall be provided unless precluded or limited by RCW 26.09.187 or 26.09.191. A dispute resolution process may include counseling, mediation, or arbitration by a specified individual or agency, or court action. In the dispute resolution process:

(a) Preference shall be given to carrying out the parenting plan;

(b) The parents shall use the designated process to resolve disputes relating to implementation of the plan, except those related to financial support, unless an emergency exists;

(c) A written record shall be prepared of any agreement reached in counseling or mediation and of each arbitration award and shall be provided to each party;

(d) If the court finds that a parent has used or frustrated the dispute resolution process without good reason, the court shall award attorneys' fees and financial sanctions to the prevailing parent;

(e) The parties have the right of review from the dispute resolution process to the superior court; and

(f) The provisions of (a) through (e) of this subsection shall be set forth in the decree.

NOTES OF DECISIONS (37)

In general
Arbitration
Best interests of child
Construction of plan
Contempt
Decision-making authority
Purpose of plan
Religion, decision-making authority
Relocation of child
Review

(5) ALLOCATION OF DECISION-MAKING AUTHORITY.

(a) The plan shall allocate decision-making authority to one or both parties regarding the children's education, health care, and religious upbringing. The parties may incorporate an agreement related to the care and growth of the child in these specified areas, or in other areas, into their plan, consistent with the criteria in RCW 26.09.187 and 26.09.191. Regardless of the allocation of decision-making in the parenting plan, either parent may make emergency decisions affecting the health or safety of the child.

(b) Each parent may make decisions regarding the day-to-day care and control of the child while the child is residing with that parent.

(c) When mutual decision making is designated but cannot be achieved, the parties shall make a good-faith effort to resolve the issue through the dispute resolution process.

(6) RESIDENTIAL PROVISIONS FOR THE CHILD. The plan shall include a residential schedule which designates in which parent's home each minor child shall reside on given days of the year, including provision for holidays, birthdays of family members, vacations, and other special occasions, consistent with the criteria in RCW 26.09.187 and 26.09.191.

(7) PARENTS' OBLIGATION UNAFFECTED. If a parent fails to comply with a provision of a parenting plan or a child support order, the other parent's obligations under the parenting plan or the child support order are not affected. Failure to comply with a provision in a parenting plan or a child support order may result in a finding of contempt of court, under RCW 26.09.160.

(8) PROVISIONS TO BE SET FORTH IN PERMANENT PARENTING PLAN. The permanent parenting plan shall set forth the provisions of subsections (4)(a) through (c), (5)(b) and (c), and (7) of this section.

Credits

[2007 c 496 § 601, eff. July 22, 2007; 1991 c 367 § 7; 1989 c 375 § 9; 1987 c 460 § 8.]

Notes of Decisions (37)

West's RCWA 26.09.184, WA ST 26.09.184
Current with all laws from the 2015 Regular and First Special Sessions that are effective on or before July 24, 2015, the general effective date for laws from the Regular Session, and available laws from the 2015 Second and Third Special Sessions

End of Document

APPENDIX G

26.09.187. Criteria for establishing permanent parenting plan

West's Revised Code of Washington Annotated Title 26. Domestic Relations Effective: July 22, 2007 *(Approx. 3 pages)*

West's Revised Code of Washington Annotated
Title 26. Domestic Relations (Refs & Annos)
Chapter 26.09. Dissolution Proceedings--Legal Separation (Refs & Annos)

Proposed Legislation

Effective: July 22, 2007

West's RCWA 26.09.187

26.09.187. Criteria for establishing permanent parenting plan

Currentness

(1) DISPUTE RESOLUTION PROCESS. The court shall not order a dispute resolution process, except court action, when it finds that any limiting factor under RCW 26.09.191 applies, or when it finds that either parent is unable to afford the cost of the proposed dispute resolution process. If a dispute resolution process is not precluded or limited, then in designating such a process the court shall consider all relevant factors, including:

(a) Differences between the parents that would substantially inhibit their effective participation in any designated process;

(b) The parents' wishes or agreements and, if the parents have entered into agreements, whether the agreements were made knowingly and voluntarily; and

(c) Differences in the parents' financial circumstances that may affect their ability to participate fully in a given dispute resolution process.

(2) ALLOCATION OF DECISION-MAKING AUTHORITY.

(a) AGREEMENTS BETWEEN THE PARTIES. The court shall approve agreements of the parties allocating decision-making authority, or specifying rules in the areas listed in RCW 26.09.184(5)(a), when it finds that:

(i) The agreement is consistent with any limitations on a parent's decision-making authority mandated by RCW 26.09.191; and

(ii) The agreement is knowing and voluntary.

(b) SOLE DECISION-MAKING AUTHORITY. The court shall order sole decision-making to one parent when it finds that:

(i) A limitation on the other parent's decision-making authority is mandated by RCW 26.09.191;

(ii) Both parents are opposed to mutual decision making;

(iii) One parent is opposed to mutual decision making, and such opposition is reasonable based on the criteria in (c) of this subsection.

(c) MUTUAL DECISION-MAKING AUTHORITY. Except as provided in (a) and (b) of this subsection, the court shall consider the following criteria in allocating decision-making authority:

(i) The existence of a limitation under RCW 26.09.191;

(ii) The history of participation of each parent in decision making in each of the areas in RCW 26.09.184(5)(a);

(iii) Whether the parents have a demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW 26.09.184(5)(a); and

NOTES OF DECISIONS (108)

In general
Agreements
Authority of court
Best interests of child
Burden of proof
Discretion of court
Evidence
Findings
Judicial notice
Mental health
Performance of parenting functions
Presumptions and burden of proof
Purpose
Relationship to parents
Religion
Relocation
Residential provisions, generally
Residential schedule
Review
Visitation
Waiver
Wishes of the child

(iv) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

(3) RESIDENTIAL PROVISIONS.

(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:

(i) The relative strength, nature, and stability of the child's relationship with each parent;

(ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;

(iii) Each parent's past and potential for future performance of parenting functions as defined in *RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;

(iv) The emotional needs and developmental level of the child;

(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight.

(b) Where the limitations of RCW 26.09.191 are not dispositive, the court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.

(c) For any child, residential provisions may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of residential time by a parent, including but not limited to requirements of reasonable notice when residential time will not occur.

Credits

[2007 c 496 § 603, eff. July 22, 2007; 1989 c 375 § 10; 1987 c 460 § 9.]

Notes of Decisions (108)

West's RCWA 26.09.187, WA ST 26.09.187
Current with all laws from the 2015 Regular and First Special Sessions that are effective on or before July 24, 2015, the general effective date for laws from the Regular Session, and available laws from the 2015 Second and Third Special Sessions

End of Document

APPENDIX H

West's Revised Code of Washington Annotated
Title 26. Domestic Relations (Refs & Annos)
Chapter 26.09. Dissolution Proceedings--Legal Separation (Refs & Annos)

Effective: July 22, 2007

West's RCWA 26.09.197

26.09.197. Issuance of temporary parenting plan--Criteria

Currentness

After considering the affidavit required by RCW 26.09.194(1) and other relevant evidence presented, the court shall make a temporary parenting plan that is in the best interest of the child. In making this determination, the court shall give particular consideration to:

(1) The relative strength, nature, and stability of the child's relationship with each parent; and

(2) Which parenting arrangements will cause the least disruption to the child's emotional stability while the action is pending.

The court shall also consider the factors used to determine residential provisions in the permanent parenting plan.

Credits

[2007 c 496 § 604, eff. July 22, 2007; 1987 c 460 § 14.]

West's RCWA 26.09.197, WA ST 26.09.197
Current with all laws from the 2015 Regular and First Special Sessions that are effective on or before July 24, 2015, the general effective date for laws from the Regular Session, and available laws from the 2015 Second and Third Special Sessions

End of Document

APPENDIX I

West's Revised Code of Washington Annotated
Title 26. Domestic Relations (Refs & Annos)
Chapter 26.09. Dissolution Proceedings--Legal Separation (Refs & Annos)
Notice Requirements and Standards for Parental Relocation

West's RCWA 26.09.520

26.09.520. Basis for determination

Currentness

The person proposing to relocate with the child shall provide his or her reasons for the intended relocation. There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following factors. The factors listed in this section are not weighted. No inference is to be drawn from the order in which the following factors are listed:

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

(2) Prior agreements of the parties;

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

(4) Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191;

(5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;

(6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;

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

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

(9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;

(10) The financial impact and logistics of the relocation or its prevention; and

(11) For a temporary order, the amount of time before a final decision can be made at trial.

Credits

[2000 c 21 § 14.]

Notes of Decisions (59)

NOTES OF DECISIONS (59)

In general
Discretion of court
Findings
Guardian ad litem recommendation
Hearing
Presumption and burden of proof
Relocation factors
Review
Sufficiency of evidence
Validity

APPENDIX J

A Move in the Right Direction? Best Interests of the Child Emerging as the Standard for Relocation Cases

Linda D. Elrod

SUMMARY. Relocation cases have become more common in our increasingly mobile society. After a divorce the parent with primary residential custody of a minor child may seek to move to a new location for a new partner, spouse, job, or family. The nonmoving parent objects and the courts have to decide whether to allow the child to move. This article explores the various legal approaches taken by American courts in trying to solve these difficult custody cases. While some courts presume it is not in the best interests of a child to move, others presume that it is. The majority trend, however, appears to be toward a best interests of the child standard with no presumptions. doi:10.1300/J190v03n03_03

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KEYWORDS. Relocation, change of circumstances, move away, best interests of the child, stability

Across the country, applicable standards remain distressingly disparate.[1]

Relocation cases "present some of knottiest and most disturbing problems."[2] In the past ten years, the number of relocation cases has grown on trial and appellate court dockets as parents try to move themselves and their children across town, the country and even the world. Census data reveals that almost one half of Americans move in a five year period with an estimated one-fourth of custodial[3] mothers moving within four years of a divorce. The reasons for moving are as varied as the people–remarriage, corporate downsizing, job transfers, extended families, educational opportunities, or to put distance between an ex-spouse or partner. As early as 1992, one reporter summarized the problem as follows:

> The pain of divorce wears new guises.... The simultaneous rise of the dual-career couple and the divorce rate in recent years has created crises for an unprecedented number of American parents and children.... Joint custody or visitation rights, difficult at best, can become a major problem when one parent is transferred or takes a job far away and the other is unable or unwilling to move, too.... So people with careers they care about are torn between staying close to their kids and working where the opportunity is. The options all have drawbacks. Children are shuttled hundreds of miles back and forth between parents. A distant parent fades from the children's lives. A parent rejects a move in order to stay near the child and rues the sacrifice of career objectives.[4]

The relocation of the primary residential parent will fundamentally alter the child's existing relationships and environment, including physical residence, school, and community. At the least, the parents or the court will have to adjust the existing parenting schedule. At the most, the nonmoving parent may seek, and sometimes receive, primary residential custody. Legislative and court approaches to parental requests for relocation vary from state to state. Uniformity is woefully lacking. In 1990, the Pennsylvania Supreme Court observed, "Our research has failed to reveal a consistent, universally accepted approach to the ques-

tion of when a custodial parent may relocate out-of-state over the objection of the non-custodial parent. . . ."[5]

Sixteen years, and hundreds of cases later, confusion and controversy remain over what are, and what should be, the legal standards to apply when a parent seeks to move away with a minor child. As the New Jersey Supreme Court observed in a relocation case:

> . . . there is a clash between the custodial parent's interest in self-determination and the noncustodial parent's interest in the companionship of the child. There is rarely an easy answer or even an entirely satisfactory one . . . If the removal is denied, the custodial parent may be embittered by the assault on his or her autonomy. If it is granted, the noncustodial parent may live with the abiding belief that his or her connection to the child has been lost forever.[6]

Among the complex issues that need to be faced are the constitutional rights of both parents and children and whether the same standards used to modify existing custodial and residency arrangements should be applied in relocation cases. Courts and legislatures have experimented with burdens of proof, presumptions for and against relocation, and have developed lists of factors. The American Law Institute has developed principles which include a relocation provision[7] and the American Academy of Matrimonial Lawyers has developed standards for relocation cases.[8]

This article explores the constitutional issues raised by relocation cases; the use of geographical restrictions in initial custody orders; and provides an overview of the patchwork of statutory and court-made standards, presumptions and burdens applicable throughout the country. The article concludes that the current movement appears to be away from presumptions and towards applying a best-interests-of-the-child analysis using a variety of factors in relocation cases.

THE CONSTITUTION AND RELOCATION

The United States Supreme Court has recognized at least two fundamental rights that may compete in a relocation case. First, parents have a fundamental right to the care, custody and control of their children.[9] As between fit parents who are divorcing or do not live together, courts award custody and make residential provisions based on the "best inter-

est" of the child.[10] The second fundamental right is the right of citizens of the United States to travel freely between the states.[11] A citizen's right to travel encompasses the right to migrate, resettle, find a new job and start a new life. The right to travel can be infringed upon only if there exists a compelling state interest.[12] Changing a child's custody solely because the residential parent attempts to relocate would appear to infringe on the parent's right to travel. The Wyoming Supreme Court stated:

> . . .[T]he right to travel enjoyed by a citizen carries with it the right of a custodial parent to have the children move with that parent. This right is not to be denied, impaired, or disparaged unless clear evidence before the court demonstrates another substantial and material change of circumstance and establishes the detrimental effect of the move upon the children.[13]

Finding that neither the rights of a parent nor the duty of state courts to adjudicate custody justified restricting the right to travel under the United States and Wyoming Constitutions, the Wyoming Supreme Court found that a proposed relocation could not be a change of circumstances by itself to allow a court to reconsider a custodial placement.[14] The necessity for the nonmoving parent to prove a substantial change or circumstances *and* to prove that the move will have a detrimental effect on the child makes it easier for a custodial parent to move.

A couple of courts have avoided the constitutional argument by disingenuously finding that the parent is free to travel, but without the child.[15] The reality is that the "threat of losing custody makes the right to travel meaningless for many custodial parents who will not leave even in the face of few job prospects or a spouse living elsewhere."[16] The nonresidential parent's right to travel remains as no court approval is needed. One court found that a parent voluntarily waives the constitutional right to travel by agreeing to a geographical restriction.[17]

Minnesota elevates the child's welfare to a compelling state interest, thereby eliminating the need to balance the parents' competing constitutional rights. Therefore, the best interests of the child will trump the parents' right to travel.[18] However, the Colorado Supreme Court explicitly rejected this view, finding that "in the absence of demonstrated harm to the child, the best interests of the child standard is insufficient to serve as a compelling state interest overruling the parents' fundamental rights."[19] The Court noted:

> . . . from a practical standpoint, adopting the best interests of the child as a compelling state interest to the exclusion of balancing the parents' rights could potentially make divorced parents captives of Colorado. This is because a parent's ability to relocate would become subject to the changing views of social scientists and other experts who hold strong, but conflicting, philosophical positions as to the theoretical "best interests of the child."[20]

The Colorado Supreme Court chose to adopt the view of the counts in Maryland[21] and New Mexico[22] that places the burden equally on both parents to demonstrate under the state's statutory factors what is in the child's best interest.[23] The court must promote the best interests of the child while affording protection equally between the majority time parent's right to travel and the minority time parent's right to parent.[24]

INITIAL ORDERS AND GEOGRAPHICAL RESTRICTIONS

If a parent wishes to move at the time of the initial custody proceeding, most courts use the same best interest of the child standard used in any custody dispute between fit parents.[25] The proposed relocation will be viewed as part of the best interests analysis with one parent living in another jurisdiction.[26]

Even if a move is not contemplated, some courts have inserted geographical restrictions in either the initial or a modified custody order.[27] Most parents determine their own parenting plan by a mediated or negotiated agreement, many of which contain geographical restrictions. Several states presume that the parents' agreement is in the best interests of the child.[28] The Arizona statute illustrates this:

> The court shall not deviate from a provision of any parenting plan or other written agreement by which the parents specifically have agreed to allow or prohibit relocation of the child unless the court finds that the provision is no longer in the child's best interests. There is a rebuttable presumption that a provision from any parenting plan or other written agreement is in the child's best interests.[29]

Based on the circumstances, however, a court may find that an agreement containing a provision to remain in one community is contrary to the best interest of a particular child.[30] Several appellate courts have dis-

approved of self-executing geographical restrictions, i.e., those that provide for an automatic change of custody to the nonmoving parent if the restriction is violated.[31] These self-executing provisions amount to improper speculation concerning the possibility of future changed circumstances and are unenforceable.[32] As in other instances, the judge has the power to act to protect the best interests of the child, irrespective of the parties' stipulations.

POST-DECREE RELOCATION

The vast majority of relocation cases occur following an initial custody order. Before the enactment of the Uniform Child Custody Jurisdiction Act (UCCJA), the fear of losing jurisdiction caused many courts to deny relocations without the noncustodial parent's consent or without a showing of extraordinary circumstances.[33] The Parental Kidnapping Prevention Act, and the Uniform Child Custody Jurisdiction and Enforcement Act, now in 45 jurisdictions, use the concept of continuing exclusive jurisdiction which clarifies that jurisdiction remains in the decree state as long as one parent remains in the state and there is a basis for jurisdiction under the state's law. Therefore, the fear of loss of jurisdiction is no longer a factor in most relocation cases.

The typical case begins with the residential parent filing a motion for permission to relocate. Some cases, however, start when the nonmoving parent learns of the move, either by letter or official notice required by statute, and files a motion to modify the existing order. States vary as to the requirements that a moving parent must take and as to which parent bears the burden of proof. Some courts use the same standards for an intrastate and interstate move.[34]

Notice Requirements

Since 1990, several states have enacted statutes requiring notice of an intent to move if the nonresidential parent does not consent. These statutes vary on when notice must be given, who is entitled to notice, the effect of notice and the penalties for noncompliance. In some states, notice is to be given not only to parents but also to others with court-ordered access, such as grandparents. Notice may not be required if the nonmoving parent has been convicted of any crime in which the child is the victim or if the reason for the move is fear of domestic violence. Times vary from "reasonable" to a specific number of days.[35] The

AAML Standards and *ALI Principles*, as well as several state statutes, require 60 days notice.[36] Some states require notice for any move.[37] In other states, parents need only give notice if the parent is moving out of state or a certain geographical distance.[38]

Many statutes leave the contents of the notice to local practice. The *ALI Principles* require the notice to include:

a. the intended date of the relocation;
b. the address of the intended new residence;
c. the specific reasons for the intended relocation; and
d. a proposal for how custodial responsibility should be modified, if necessary, in light of the intended move.[39]

The requirement for notice does not necessarily mean that the move is a change of circumstances.[40] It may, however, mean that the court will allow a hearing if the nonrelocating parent objects to the move. The failure to give notice may be relevant.[41] Generally, if the nonrelocating parent does not object within a certain time after receiving notice, the statute may allow the relocation without a return to the court.

Presumptions and Burdens of Proof

Most relocation cases require modifications to an original order. In most states, to encourage stability for the child, there is a presumption that the original order should stay in effect. A parent wishing to modify an existing custody order has the initial burden of showing that a material or substantial change of circumstances has occurred since the original decree that justifies a hearing on whether the child's custody should be changed.[42] If a hearing is granted, the person seeking modification must show that a change of the current arrangements is in the child's best interest. A few states use a variation of the Uniform Marriage and Divorce Act "endangerment" standard which requires a showing that "the child's present environment may endanger seriously his physical, mental, moral, or emotional health" before custody may be modified.[43]

Relocation cases in some states are handled as are other modification cases. In other states, there are either different or additional standards for relocation cases. There are basically three approaches:

1. a move alone is not a change in circumstances, resulting in a presumption in favor of relocation by the custodial or residential parent;

2. a move may be change of circumstances and the court may use shifting presumptions so the custodial or residential parent has the initial burden to show good faith and the move is in the child's best interest, then the burden shifts to the nonresidential parent to show the move is not in the child's best interests; and
3. no presumptions, where each party bears the burden of showing why the child's best interests is to be with one of them.

Jurisdictions are split as to whether the custodial parent's proposal to relocate is sufficient by itself to constitute a material change in circumstances that warrants a hearing on the best interests of the child. Whether the proposed move is a change of circumstances affects the burden of proof. If the relocation is not a change in circumstances, then the presumption is that the custodial parent can move. If the move is a change of circumstances, then both parents must put on evidence showing why the move is, or is not, in the child's best interests.

Not a Change of Circumstances–Presumption for Relocation

Several courts have found that the relocation of the primary residential parent does not necessarily constitute a change in circumstances.[44] These jurisdictions favor the child's stability (emotional as opposed to geographical) in the primary custodial relationship.[45] For example, the Oklahoma Supreme Court stated:

> In a relocation case the noncustodial parent seeking to restrain the custodial parent from moving must meet the heavy burden to show that circumstances justify reopening the question of "custody."[46]

Some states find there no change of circumstances if the move is within the same state.[47] Most courts that do not find the proposed relocation itself to be a change of circumstances create a presumption which favors the moving parent. These courts give the residential parent the right to make decisions as to residence and put the burden on the nonmoving parent to show harm.[48] For example, the Arkansas Supreme Court stated:

> . . . [T]oday, we hold that relocation alone is not a material change in circumstance. We pronounce a presumption in favor of relocation for custodial parents with primary custody. The noncustodial parent should have the burden to rebut the relocation presumption.

> The custodial parent no longer has the obligation to prove a real advantage to herself or himself and to the children in relocating.[49]

Other states appear to have a presumption in favor of allowing a custodial parent to move either by statute[50] or by case law.[51] Such a presumption reduces litigation because it makes contesting a move more difficult. Only those nonresidential parents who are actively involved in the child's day to day life or have shared custody may feel they have enough evidence to overcome the presumption.

The *ALI Principles* favor relocation. The relocation of a parent constitutes a substantial change in circumstances only when the relocation significantly impairs either parent's ability to exercise responsibilities the parent has been exercising or attempting to exercise under the parenting plan. Even if the relocation constitutes a change of circumstances, the ALI would allow the parent who has been exercising the clear majority of custodial responsibility to relocate with the child if that parent shows that the relocation is for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose.[52]

In the much publicized *Burgess* case,[53] the California Supreme Court allowed a mother to move forty miles away so she would not have to commute to her job and found that the statute stressing the importance of frequent contact with both parents did not require the court to impose a burden of proof on those wishing to relocate or alter its best interest analysis. In the more recent *LaMusga* case, the California Supreme Court reiterated that if there is an existing order, "a change of custody is not justified simply because the custodial parent has chosen, for any sound good faith reason, to reside in a different location, but only if, as a result of relocation . . . the child will suffer detriment. . . ."[54] The Court, however, went on to note:

> . . . the noncustodial parent bears the initial burden of showing that the proposed relocation of the children's residence would cause detriment to the children, requiring a reevaluation of the children's custody. The likely impact of the proposed move on the noncustodial parent's relationship with the children is a relevant factor in determining whether the move would cause detriment to the children and, when considered in light of all of the relevant factors, may be sufficient to justify a change in custody. If the noncustodial parent makes such an initial showing of detriment, the court must perform the delicate and difficult task of determining whether a change in custody is in the best interests of the children.[55]

Therefore, while the relocation alone may not be a sufficient change of circumstances, a showing of harm to the children's relationship with the nonmoving parent may be a sufficient change in circumstances to allow a review of the children's best interests.[56] The California Supreme Court in *LaMusga* indicated that there may be additional factors which will make the proposed relocation a sufficient change to conduct an evidentiary hearing:

> . . . [T]he likely consequences of a proposed change in the residence of a child, when considered in the light of all the relevant factors, may constitute a change of circumstances that warrants a change in custody, and the detriment to the child's relationship with the noncustodial parent that will be caused by the proposed move, when considered in light of all the relevant factors, may warrant denying a request to change the child's residence or changing custody.[57]

Relocation Alone a Change in Circumstances

In some states, either statutes[58] or judges require that the relocation of the custodial parent constitutes a material change in circumstances which requires a full evidentiary hearing.[59] If a hearing is held, most states require the relocating parent to initially bear the burden of proving that the proposed relocation is made in good faith (there is a legitimate reason for the move) and that it is in the child's best interests to continue living with him or her.[60] The burden then shifts to the nonmoving parent to show that the proposed relocation is not in the best interest of the child.[61] The New Hampshire statute illustrates this approach:

> V. The parent seeking permission to relocate bears the initial burden of demonstrating, by a preponderance of the evidence, that:
> (a) The relocation is for a legitimate purpose; and
> (b) The proposed location is reasonable in light of that purpose.
> VI. If the burden of proof . . . is met, the burden shifts to the other parent to prove, by a preponderance of the evidence, that the proposed relocation is not in the best interest of the child.[62]

The shifting burden of proof looks at the reality that the court has already entrusted the care of the child to one of the parents who makes the day to day decisions. If the relocating parent can show a good faith reason for the move, the non-custodial parent then has the burden of showing (with concrete, material reasons) why relocation is not in the child's best interest.[63]

Courts are more likely to find that a proposed relocation is a material change of circumstances in a true shared physical custody situation. If both parents are involved in the day to day care of the child, either the parents or the court will need to fashion a new parenting schedule.[64] The label attached to the custody/residency arrangement is less important than the actual parenting that is happening. Where the parents truly share both legal and physical custody, an application by one parent to relocate with the child to an out-of-state location is analyzed as an application for a change of custody.[65] Among the things that courts look at to determine if parents are sharing "primary custodial responsibilities" are (1) transporting the child to and from school; (2) attending the child's school activities and sporting events; (3) helping the child with homework; (4) preparing the child's meals; (5) caring for the child overnight; and (6) attending to the child's medical needs.[66]

No Presumption Either Way

The trend, however, is away from presumptions and toward using a best interests test.[67] Some courts handle relocation cases in cases in which the parents share custody, discussed *supra*, as initial custody orders, using the best interests rules, rather than requiring a change of circumstances.[68] In overturning the stringent standard requiring a custodial parent to show "exceptional circumstances" for a move, the New York Court of Appeals stated:

> It serves neither the interest of the children nor the needs of justice to view relocation cases through the prisms of presumptions and threshold tests that artificially skew the analysis in favor of one outcome or the other.[69]

In Georgia, the Supreme Court, in changing from a presumption in favor of relocation to the best interest standard, stated:

> [T]he primary consideration of the trial court in deciding custody matters must be directed to the best interests of the child involved

> . . . any determination of the best interests of the child must be made on a case-by-case basis. This analysis forbids the presumption that a relocating custodial parent will always lose custody and, conversely, forbids any presumption in favor of relocation.[70]

Recently, the Colorado Supreme Court stated:

> . . . each parent has the burden to persuade the court that the relocation of the child will be in or contrary to the child's best interests, or that the parenting plan he or she proposes should be adopted by the court. The focus of the court, however, should be the best interests of the child. The court may decide that it is not in the best interests of the child to relocate with the majority time parent. Then, if the majority time parent still wishes to relocate, a new parenting time plan will be necessary.
>
> Alternatively, the court may decide that it is in the best interests of the child to relocate with the majority time parent. In that situation, the court must fashion a parenting time plan which protects the constitutional right of the minority time parent to care for and control the child. In either event, the court must thoroughly disclose the reasons for its decision and make specific findings with respect to each of the statutory factors.[71]

These cases, and others represent a clear trend toward using a case specific, fact sensitive, best interest analysis in every case.

FACTORS IN EVALUATING MOVE IN CHILD'S BEST INTEREST

> *. . . Sensitive case-by-case balancing is required to ensure that all interests–both parents' and children's are treated as equitably as possible.*[72]

As in other custody determinations between fit parents, the best interest of the child is not always clear.[73] Some state legislatures and courts have developed lists of factors for the court to consider in evaluating the child's best interests in custody cases; others have lists specific to relocation. Unfortunately, most statutes have no weight assigned to the importance of the factors. If the best interest of the child is truly the standard, then the focus should be on the individual child's age and de-

velopmental, physical, emotional, spiritual and educational needs. The judge then must evaluate if the child's needs are being met by an individual, such as the primary caregiver, by both parents, or by the larger community. However, many of the factors stress "parent" considerations such as the distance, cost and difficulty of visitation.

Statutory Factors

Statutory factors vary from state to state but contain many similarities. Louisiana enacted the factors developed by the American Academy of Matrimonial Lawyers which are among the most child-focused. These factors require consideration of:

A.(1) The nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate and with the nonrelocating person, siblings, and other significant persons in the child's life;
(2) The age, developmental stage, needs of the child, and likely impact of relocation on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
(3) The feasibility of preserving the relationship between the nonrelocating person and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties;
(4) The child's preference, taking into consideration the age and maturity of the child;
(5) Whether the person seeking relocation has an established pattern of conduct promoting or thwarting the nonrelocating person's relationship with the child;
(6) Whether the relocation will enhance the general quality of life for both the custodial party seeking relocation and the child, including but not limited to financial or emotional benefit or educational opportunity;
(7) The reasons each person seeks or opposes relocation; and
(8) Any other factor affecting the best interest of the child.
B. The court may not consider whether or not the person seeking relocation of the child will relocate without the child if relocation is denied or whether or not the person opposing relocation will also relocate if relocation is allowed.[74]

Colorado amended its statute in 2001 to require a court to consider twenty-one factors: those used to make the initial best interests determination, plus nine additional factors particularly relevant to relocation.[75] Several other states have lists of factors.[76]

Court Enumerated Factors

In the absence of a statute specifically tailored to relocation, appellate courts have set out factors to help trial judges evaluate the child's best interest in move away cases. A summary laundry list of the various factors that courts consider are:

1. The prospective advantages of the move in improving the moving parent's and the child's quality of life;
2. The integrity of the moving parent's motive for relocation, considering whether it is to defeat or deter visitation by the nonmoving parent;
3. The integrity of the nonmoving parent's motives for opposing the move;
4. Whether there is a realistic opportunity for visitation which can provide an adequate basis for preserving and fostering the nonmoving parent's relationship with the child, and the likelihood that each parent will comply with such alternate visitation;
5. What was contemplated by the parties and the court at the time the original orders were entered;
6. The history of the relationship of the child and each party;
7. The input from the attorney for the minor child;
8. The family relations report;
9. The cost of visitation, considering the distance between the two cities, the cost of travel, and the ease of travel;
10. The impact of relocation on the child and the chance for improving the child's quality of life:
    a. Emotional, physical and developmental needs of the children;
    b. the children's opinion or preference as to where to live;
    c. the extent to which the moving parent's income or employment will be enhanced;
    d. the degree to which housing or living conditions would be improved;
    e. the existence of educational, health and leisure opportunities at least equivalent to existing ones;

f. the quality of the relationship between the children and each parent;
g. the strength of the children's ties to the present community and extended family there;
h. the likelihood that allowing or denying the move would antagonize hostilities between the two parties;
i. any special needs or talents of the child that require accommodation and whether it is available in the new location;
j. whether the child is a senior year in high school and should not which be moved until graduation without his or her consent; and
k. any other factor bearing on the child's interest.[77]

Using the Factors to Find the Best Interests of the Child

> *. . . Usually, in relocation cases, there is no good or right answer, especially for the child.*[78]

Although numerous factors are found in the statutes and cases, trial judges seem to concentrate on three major factors: the reasons for and against the move; whether the move will enhance the child's quality of life; and the availability of realistic substitute visitation schedule to maintain a relationship with the nonmoving parent. Several states have noted that when analyzing a situation in which one parent seeks to relocate with the minor children, the paramount need for continuity and stability in custody arrangements, and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker, weigh heavily in favor of maintaining ongoing custody arrangements. On the other hand, the attachment between the child and the non-relocating parent also will be an important consideration.[79]

Motives Matter

Courts have approved a number of reasons as valid for moving, with most relating to starting a new life and improving the overall economic condition of the custodial parent and the child.[80] The *ALI Principles* set out the following as valid reasons for a move:

> (1) to be close to significant family or other sources of support, (2) to address significant health problems, (3) to protect the safety of the child or another member of the child's household from a signifi-

> cant risk of harm, (4) to pursue a significant employment or educational opportunity, (5) to be with one's spouse or domestic partner who lives in, or is pursuing a significant employment or educational opportunity in, the new location, (6) to significantly improve the family's quality of life. The relocating parent should have the burden of proving the validity of any other purpose. . . . The court should find that a move for a valid purpose is reasonable unless its purpose is shown to be substantially achievable without moving, or by moving to a location that is substantially less disruptive of the other parent's relationship to the child.[81]

These ALI reasons have been cited with approval in Rhode Island,[82] Vermont,[83] and West Virginia.[84]

Most courts have been sympathetic to a residential parent who wants to move because either the parent or a new spouse is being transferred, is getting a promotion or has better job opportunities.[85] A parent who is moving to take a new job may be required to show that he or she at the very least applied for a job or seriously looked for one in the area.[86] On the other hand, the parent is not required to apply for every job that might be available in the state if the parent has made a reasonable search.[87] Just because a parent has remarried or has a higher paying job offer does not ensure that the request to move will be allowed.[88]

Most often, there is not just one motive for the move, but several. For example, one mother wanted to move with a three year old because she was going to remarry, the new location had a lower cost of living than California, she would be able to stay home to care for the child, and she had family there.[89] Some courts have found a valid reason in the custodial parent's desire to move to an area in closer proximity to relatives[90] or to advance one's education.[91] However, a Nevada court denied a mother's request to move where she could obtain the same degree from the same college without relocating through either Internet classes, audio and video classes, or live classes through the college's extension campus.[92]

Courts have found the custodial parent's reasons inadequate when they seem to be not concrete or to frustrate the nonresidential parent's visitation. In the absence of abuse, the desire of one parent to distance the child from the other parent certainly will not be a sufficient reason.[93] For example, when a mother wanted to move from California to Florida to explore the possibility of a job as a parapsychologist, the court found the reason really to be to thwart the father's visitation.[94] A parent who "thinks" that the environment in another location may be better for their health may find the court rejecting the relocation for that reason.[95]

Courts have not been sympathetic to parents who unilaterally act in taking the children from the jurisdiction without the court or the other parent's permission. The court may change custody to the nonmoving parent.[96] If there is concern about parental alienation, a court may be reluctant to allow the parent and child to relocate.[97]

The motives of the nonresidential parent are important also. A parent who has not exercised visitation but just wants to keep the other parent from moving is not in a strong position. In one case, the court allowed the move where the father had been manipulative and controlling.[98] The court can look at the likelihood that allowing or denying the move would antagonize the hostilities between the two parties.[99]

Child's Quality of Life Issues

The proposed relocation may justify a change in custody only if such a change is in the child's best interests. If the judge changes the child's custody to the noncustodial parent, even if staying in the same city, the child will experience a change. Therefore, the judge has to weigh carefully the two living arrangements, keeping in mind that it is the child, not the warring parents, whose interests need to be protected. As one judge noted:

> . . . a child's development is not something with which courts should experiment and risk disruption. Although ideally a child would develop a close relationship with his loving and caring parents through an equal division of parenting time, the ideal is difficult to achieve when, as in this case, the child's parents elect to establish their homes in different communities. This problem is further compounded by the friction that often develops between ex-spouses as they move on with their lives after their divorce. . . . In ordering this change in custody the *trial court forgot that the paramount consideration in a child custody decision is the child's best interests, not those of his parents.*[100]

The child's quality of life may be tied to a large extent to the custodial/residential parent's quality of life. A child theoretically benefits from a custodial parent who has a stable relationship, more money, more time, and less conflict.[101] Where the proposed relocation provides education, emotional and economic benefits for the child, many courts feel the relocation should be granted.[102]

Courts have changed custody to the nonmoving parent where the reasons for the move and the quality of the new environment do not outweigh the adverse impact.[103] For example, when a mother who had sole custody moved to North Carolina before the court hearing, the court changed custody to the father. The court found that a relocation was not in child's best interest because both sets of child's grandparents lived where father resided, the child was familiar and happy in father's home and had lived there almost nine months at the time of the modification hearing and expressed a preference to live with the father.[104] A Missouri court found that it was not in the children's best interests to move 1,200 miles because the father lived only seven houses away and was an active participant in their daily lives.[105] In another case, where children had moved and were experiencing academic and attendance difficulties in addition to separation from their father, the court changed custody to the father during the school year.[106]

There is little valid research on whether it is in the best interests of a child to remain near to both parents.[107] Research does show that children suffer the most harm in high conflict cases.[108] To the extent that a relocation reduces the conflict between the parents, it could enhance the child's quality of life. Studies have shown that contact with both parents is best when the parents can cooperate.[109] Although one study purports to show that children of divorced parents who are separated from one parent due to either parent moving beyond an hour's drive are significantly less well off on many child mental and physical health measures compared to those children whose parents do not relocate,[110] this study has been severely criticized both for its methodology and for its conclusions.[111] More research needs to be done on the effects of relocation on children of different ages.

Alternative Parenting Plans

Almost every move to a distant relocation is going to adversely affect the nonmoving parent's visitation rights or parenting time.[112] That new arrangements have to be made that are more difficult or less convenient is not sufficient reason to deny the move.[113] The New York Court of Appeals stated:

> 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 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.[114]

The key is to craft an alternate visitation schedule that continues and preserves the relationship between the child and the non-custodial parent without imposing all of the burdens of relocation on the child. The cases which are most successful in allowing a move have been those in which the moving parent has carefully considered and drafted plans that will minimize the adverse effect that the move will have on the parent-child relationship with the nonmoving parent.

Among the factors the court will consider are the distance between the two cities, the costs of travel, and the ease of travel. Restructuring visitation often means scheduling physical visitation for more time during the summer and school holidays. The result may be more actual days, but less frequency than the original order.

With today's modern methods of communication, there are more opportunities for maintaining contact with parents and others who do not live close to the child. Virtual visitation offers alternate ways for parents to have contact.[115] One court noted that "increased use of alternatives to normal physical visitation, such as phone calls, letters and even e-mail . . . are feasible."[116] Several other courts have recognized the advances in technology that have made possible contacts that would have been unheard of twenty years ago.[117] While the new technology will not substitute for personal contact, it can help maintain the parent-child connection.

INTERNATIONAL MOVES

A handful of states that has considered the issue have used the same standard for a contemplated international move as for an interstate move.[118] Relocation to a foreign country, however, may involve additional considerations. For example, there may be the introduction of cultural conditions far different from those experienced in the United States. The greater distance may make the additional costs of visitation prohibitive in many cases, although virtual visitation alternatives may exist.[119] In addition, there may be some concerns about enforcement of custody and visitation orders in another country. Alabama has a statute which considers as a factor whether the proposed relocation is to a foreign country which does not normally enforce the rights of noncustodial parents.[120]

CONCLUSION

Statutes and court decisions on relocation have created a true hodge- podge of presumptions, burdens, factors and lists. There remains no universal standard. Within the past four years, it does appear clear that the emerging standard is the case-by-case best interests of the child approach. While it is hard to argue with a judge trying to do what is in a child's best interests, as we have seen in other areas, the child's best interests are hard to predict and the decision can be highly subjective. In addition, if the concern is for the child to maintain contact with both parents, there needs to be an avenue for a custodial parent to challenge a noncustodial parent's relocation which may not be in the child's best interests. The uncertainty inherent in a best interest test leads to often painful, expensive, and time-consuming litigation with inconsistent results. As one dissenting judge noted:

> [R]eplacement of concrete standards with an amorphous best-interest-of-the-child standard will leave the trial courts free to consider any circumstance in a child's life as a potential reason to uproot the child . . . Without any guidance [in the form of presumptions] . . . every dissatisfaction a noncustodial parent has with the parenting of the custodial parent becomes a proper basis for re-litigating custody.[121]

Relocation cases are hard on the parents, the children, the lawyers and the judge. While a parent may think he or she has won a relocation case, if the child suffers loss of a strong parent-child relationship or has to fly across the country during every break, the child has lost something significant. On the other hand, if the courts truly focus on the needs of the child, rather than the demands and wishes of the parents, the best interest test may be the most equitable way to decide these troublesome cases. The outcome of any given case will depend upon the existence of a statute or case precedent making it easy or difficult for a parent to relocate with a child, the type of parenting arrangement or order that currently exists, and the attitudes of the judge who will be hearing the motion as to the best interests of any given child.[122]

NOTES

1. Gruber v. Gruber, 583 A.2d 434, 437 (Pa. Super. Ct. 1990).

2. Tropea v. Tropea, 665 N.E.2d 145, 148 (N.Y. 1996).

3. While the majority of states still use the term "custodial" parent to designate the parent who has physical residency of the child, some states distinguish residency from custody; other states use "majority time" or "residential parent."

4. JoAnne S. Lublin, *Cast Asunder: After Couples Divorce, Long-Distance Moves are Often Wrenching*, WALL STREET J., Nov. 20, 1992.

5. Gruber, 583 A.2d at 437.

6. Bauers v. Lewis, 770 A.2d 214, 217 (N.J. 2001).

7. ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.17 (2002) [hereinafter ALI PRINCIPLES].

8. *American Academy of Matrimonial Lawyers Proposed Model Relocation Act*, 15 J. AM. ACAD. MATRIMONIAL LAWYERS 1 (1998) [hereinafter AAML Standards].

9. Troxel v. Granville, 530 U.S. 57 (2000); Santosky v. Kramer, 455 U.S. 745 (1982).

10. *See generally* LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE, ch. 4 (West/Thomson 2004 and Supp. 2005).

11. *Id.* at § 17:26. *See* United States v. Guest, 383 U.S. 745 (1966); Shapiro v. Thompson, 394 U.S. 618 (1969); Jones v. Helms, 452 U.S. 412 (1981); Saenz v. Roe, 526 U.S. 489 (1999). *See* Arthur B. La France, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1 (1996); Paula M. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625 (1985); Anne L. Spitzer, *Moving and Storage of Post-Divorce Children: Relocation, the Constitution and the Courts*, 1985 ARIZ. ST. L. J. 1 (1985).

12. Jones v. Helms, 452 U.S. at 415-16.

13. Watt v. Watt, 971 P.2d 608, 615-16 (Wyo. 1999).

14. *Id.*

15. *See In re* Marriage of Johnson, 660 N.E.2d 1370 (Ill. App. Ct. 1996); *In re* C.R.O., 96 S.W.3d 442 (Tex. Ct. App. 2002). *See* Roger M. Baron, *Custody Relocation Restrictions: A Tool for Preventing Conflicts*, 17 FAIR$HARE 5-6 (Apr. 1997)(arguing that parents' constitutional rights to travel do "not include the freedom to 'travel with the child.'").

16. *See* Leslie Eaton, *Divorced Parents Move, and Custody Gets Trickier*, LAW WISE 5 (Feb. 2005)(discussing Colorado case in which judge denied mother's move to Arizona for a job and another case of a mother who shuttles between her husband and son in California and her daughter from a first marriage who judge made stay in New York).

17. Tomasko v. DuBuc, 761 A.2d 407 (N.H. 2000).

18. *See* LaChappelle v. Mitten, 607 N.W.2d 151, 163 (Minn. Ct. App.), *cert. denied* Mitten v. LaChapelle, 531 U.S. 1011 (2000); Weiland v. Ruppel, 75 P.3d 176 (Idaho 2003). *See also* David M. Cotter, *Oh, The Place You'll (Possibly) Go! Recent Case Law on Relocation of the Custodial Parent*, 16(9) DIVORCE LITIG. (Sept. 2004).

19. *In re* Marriage of Ciesluk, 113 P.3d 135, 145 (Colo. 2005).

20. *Id.*

21. *See* Braun v. Headley, 750 A.2d 624, 635 (Md. Ct. Spec. App. 2000), *cert. denied*, 755 A.2d 1139 (Md. 2000), *cert. denied*, 531 U.S. 1191 (2001) (finding no constitutional infirmity in giving *equal* status to the custodial parent's right to travel, and the benefit to be given the child from remaining with the custodial parent and the benefit from the non-custodial parent's exercise of his right to maintain close association and frequent contact with the child). *See also In re* D.M.G., 951 P.2d 1377 (Mont. 1998).

22. *See* Jaramillo v. Jaramillo, 823 P.2d 299, 307-09 (N.M. 1991).

23. *In re* Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005).

24. Ciesluk, 113 P.3d at 142.

25. ELROD, CHILD CUSTODY, *supra* note 10, at § 4:35. *See* Spahmer v. Gullette, 113 P.3d 158 (Colo. 2005); Ford v. Ford, 789 A.2d 1104, *cert. denied* 796 A.2d 556 (Conn. 2002); Stangel v. Stangel, 355 N.W.2d 489, 490 (Minn. Ct. App .1984), *rev. denied*; Barney v. Barney, 754 N.Y.S.2d 108 (App. Div. 2003); Landis v. Landis, 869 A.2d 1003 (Pa. Super. Ct. 2005); Resor v. Resor, 987 P.2d 146 (Wyo. 1999).

26. *See* Ragghanti v. Reyes, 20 Cal. Rptr. 3d 522 (Ct. App. 2004); Davis v. Davis, 588 S.E.2d 102 (S.C. 2003); Pahl v. Pahl, 87 P.3d 1250 (Wyo. 2004).

27. *See* Leeds v. Adamse, 832 So. 2d 125 (Fla. Dist. Ct. App. 2002); Ziegler v. Ziegler, 691 P.2d 773 (Idaho 1985); Carlson v. Carlson, 661 P.2d 833 (Kan. Ct. App. 1983).

28. *See* KAN. STAT. ANN. § 60-1610(a) (2005); MICH. COMP. L. ANN. § 722.31(5) (2004). *See* Pointer v. Bell, 719 So. 2d 222 (Ala. Civ. App. 1998). *See also* ELROD, *supra* note 10, at § 4.07.

29. ARIZ. REV. STAT. ANN. § 25-408 (2004).

30. *See* Godwin v. Balderamos, 876 So. 2d 1169 (Ala. Civ. App. 2003); Bell v. Bell, 572 So. 2d 841 (Miss. 1990); Zeller v. Zeller, 640 N.W.2d 53 (N.D. 2002); *In re* Duckett, 905 P.2d 1170 (Or. Ct. App. 1995).

31. *See* Scott v. Scott, 578 S.E.2d 876, 879 (Ga. 2003); Hovater v. Hovater, 577 So. 2d 461 (Ala. Ct. App. 1990); *In re* Marriage of Seitzinger, 77 N.E.2d 282 (Ill. App. Ct. 2002); *In re* Marriage of Thielges, 623 N.W.2d 232 (Iowa Ct. App. 2000); Wilson v. Wilson, 408 S.E.2d 578 (Va. Ct. App. 1991); Watt v. Watt, 971 P.2d 608 (Wyo. 1999).

32. *See In re* Marriage of Pape, 989 P.2d 1120 (Wash. 2000); Savage v. Morrison, 691 N.Y.S.2d 842 (App. Div. 1999); Grathwol v. Grathwol, 727 N.Y.S.2d 825 (App. Div. 2001).

33. *See generally* Connie Peterson, *Relocation of Children by the Custodial Parent*, 65 AM. JUR. TRIALS 127 (2004); Nadine E. Roddy, *Stabilizing Families in a Mobile Society: Recent Case Law on Relocation of the Custodial Parent*, 8 DIVORCE LITIG. 141 (Aug. 1996).

34. *See, e.g.*, Van Asten v. Costa, 874 So. 2d 1244 (Fla. Dist. Ct. App. 2004); Schulze v. Morris, 825 A.2d 1173 (N.J. Super. Ct. App. Div. 2003).

35. For example, Indiana requires no specific time; other states require thirty or forty-five days notice. *See* Chart in Appendix.

36. ALI PRINCIPLES, *supra* note 7; AAML STANDARDS, *supra* note 8. *See* Chart in Appendix.

37. KAN. STAT. ANN. § 60-1620(a)(Supp. 2004). *See also* AAML STANDARDS, *supra* note 8.

38. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-408 (2004) (100 miles intrastate); MICH. COMP. LAWS ANN. § 722.31 (2004) (100 miles); OR. REV. STAT. § 107.159 (2004) (60 miles); UTAH CODE ANN. § 30-3-37 (2004) (150 miles).

39. ALI PRINCIPLES, *supra* note 7.

40. *See* LA. REV. STAT. 9:355.11 (providing notice of a proposed relocation of a child shall not constitute a change of circumstance warranting a change of custody); Lamb v. Wenning, 583 N.E.2d 745 (Ind. Ct. App. 1991).

41. *See* LA. REV. STAT. 9:355.11 (2004) (moving without prior notice or moving in violation of a court order may constitute a change of circumstances warranting a modification of custody); Wright ex rel McBath v. Wright, 129 S.W.3d 882 (Mo. Ct. App. 2004).

42. ELROD, *supra* note 10, at § § 17:01, 17:29; JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 10-5 (2d ed. 2004).

43. *See* Fenwick v. Fenwick, 114 S.W.3d 767 (Ky. 2003); Silbaugh v. Silbaugh, 543 N.W.2d 639 (Minn. 1996); Dehring v. Dehring, 559 N.W.2d 59 (Mich. Ct. App. 1996); Cook v. Cook, 898 P.2d 702 (Nev. 1995); Perry v. Perry, 943 S.W.2d 884 (Tenn. Ct. App. 1996).

44. *See* Hollandsworth v. Knyzewski, 109 S.W.3d 653, 657 (Ark. 2003); Botterbusch v. Botterbusch, 851 So. 2d 903 (Fla. Dist. Ct. App. 2003); Evans v. Evans, 530 S.E.2d 576 (N.C. 2000); Latimer v. Farmer, 602 S.E.2d 32 (S.C. 2004); Watt v. Watt, 971 P.2d 608, 616 (Wyo. 1999). *See also* KAN. STAT. ANN. §60-1620(c) (2005) (stating a proposed move *may* be change).

45. *See In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996); Ireland v. Ireland, 717 A.2d 676 (Conn. 1998); *Ex Parte* Murphy, 670 So. 2d 51 (Ala. 1995); Pollock v. Pollock, 889 P.2d 633 (Ariz. Ct. App. 1995); *In re* Duckett, 905 P.2d 1170 (Or. Ct. App. 1995), *rev. denied* 912 P.2d 375 (1996); Aaby v. Strange, 924 S.W.2d 623 (Tenn. 1996). For a discussion of legal issues and social science considerations *see* Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245 (1996); Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move–Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305 (1996); Richard Warshak, *Social Science and Children's Interest in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83 (2000).

46. Kaiser v. Kaiser, 23 P.3d 278, 286-87 (Okla. 2001).

47. *See* Bednarek v. Velazquez, 830 A.2d 1267 (Pa. Super. Ct. 2003); *In re* Marriage of Seitzinger, 775 N.E.2d 282 (Ill. App. Ct. 2002); Watt v. Watt, 971 P.2d 608 (Wyo. 1999). *But see* ME. REV. STAT. 19A § 1657.2.A-1 (moving more than 60 miles is presumed to disrupt the parent-child contact of nonmoving parent);

48. Godwin v. Balderamos, 876 So. 2d 1169 (Ala. Civ. App. 2003); Casey v Casey, 58 P.3d 763, 771 (Okla. 2002); Watt v. Watt, 971 P.2d 608 (Wyo. 1999).

49. Hollandsworth v. Knyzewski, 109 S.W.3d 653, 663 (Ark. 2003).

50. *See* CAL. FAM. CODE § 7501(a) (2004); KY. REV. STAT. § 403.340 (2)(2004); TENN. CODE ANN. § 36-6-108 (2004); WASH. REV. CODE ANN. § 26.09.520 (2004); WIS. STAT. ANN. § 767.327(3) (2004).

51. *See, e.g.*, Klotz v. Klotz, 747 N.E.2d 1187 (Ind. Ct. App. 2001); Rutz v. Rutz, 644 N.W.2d 489 (Minn. Ct. App. 2002); Casey v. Casey, 58 P.3d 763 (Okla. 2002);

Miller v. Miller, 2004 WL 1049158 (Ohio App. Ct. 2004); Fossum v. Fossum, 545 N.W.2d 828 (S.D. 1996); Habecker v. Giard, 820 A.2d 215 (Vt. 2003); *In re* Marriage of Horner, 93 P.3d 124 (Wash. 2004).

52 ALI PRINCIPLES, *supra* note 7.

53. *In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996). *See also* CAL. FAM. CODE § 7501(a) (2004)(codifying *Burgess*).

54. *In re* Marriage of LaMusga, 88 P.3d 81 (Cal. 2004)(citing *Burgess*).

55. *Id.* at 84-85.

56. *Id.* (clarifying that the best interest test was to be used when noncustodial parent shows harm to the parent-child relationship).

57. *Id. But see In re* Marriage of Brown & Yana, 127 P.3d 28 (Cal. 2006) (finding that while noncustodial parent could seek modification of custody order based on changed circumstances if custodial parent relocates, trial court had discretion to deny the modification request without holding an evidentiary hearing if the noncustodial parent fails to make a legally sufficient showing of detriment).

58. *See* COLO. REV. STAT. § 14-10-129(2) (2004); IOWA CODE ANN. § 598.21 (8A) (2004); ME. REV. STAT. ANN. tit. 19-A, § 1657 (2004); MO. REV. STAT. § 452.411 (2004).

59. *See* Hamilton v. Hamilton, 42 P.3d 1107, 1115 (Alaska 2002); Fowler v. Sowers, 151 S.W.3d 357 (Ky. Ct. App. 2004) (finding mother's proposed move to Alaska to be a change of circumstances); *In re* Marriage of Syverson, 931 P.2d 691 (Mont. 1997); Gietzen v. Gietzen, 575 N.W.2d 924 (N.D.1998).

60. *See* ARIZ. REV. STAT. ANN. § 25-408 (2004); 750 ILL. COMP. STAT. ANN. 5/609 (2004); MO. ANN. STAT. § 452.377 (2004). *See also* Moeller-Prokosch v. Prokosch, 27 P.3d 314 (Alaska 2001); Roberts v. Roberts, 64 P.3d 327 (Idaho 2003); Brown v. Loveman, 680 N.W.2d 432 (Mich. Ct. App.), *appeal denied*, 682 N.W.2d 86 (Mich. 2004); Devore v. Devore, 62 S.W.3d 59 (Mo. Ct. App. 2001); McLaughlin v. McLaughlin, 647 N.W.2d 577, 586 (Neb. 2002); Schmidt v. Bakke, 691 N.W.2d 239 (N.D. 2005).

61. Ireland v. Ireland, 717 A.2d 676, 682 (Conn. 1998); Bauers v. Lewis, 770 A.2d 214 (N.J. 2001); Wild v. Wild, 696 N.W.2d 886 (Neb. Ct. App. 2005).

62. N.H. REV. STAT. ANN. § 461-A:12 (2005); *In re* Pfeuffer, 837 A.2d 311 (N.H. 2003).

63. NEV. REV. STAT. ANN. § 125C.200.3 (2004). Flynn v. Flynn, 92 P.3d 1224 (Nev. 2004). *See also* Ireland v. Ireland, 717 A.2d at 682-83; Weaver v. Kelling, 53 S.W.3d 610 (Mo. Ct. App. 2001) (allowing mother's relocation because father failed to show how children's best interest would be served by transfer of custody). *But see* Classick v. Classick, 155 S.W.3d 842 (Mo. Ct. App. 2005); *In re* Marriage of Colson, 51 P.3d 607 (Or. App. Ct. 2002).

64. O'Connor v. O'Connor, 793 A.2d 810 (N.J. Super. Ct. App. Div. 2002). *See also* Brody v. Kroll, 53 Cal. Rptr. 2d 280 (Ct. App. 1996), *rev. denied*; Ayers v. Ayers, 508 N.W.2d 515 (Minn. 1993). *See also* ELROD, *supra* note 10, at §17:35.

65. O'Connor, 793 A.2d at 821-22.

66. *Id.* at 824 (finding shared custody a father who picked the child up from school several days a week, kept child evenings and overnights and during times mother traveled).

67. *See* FLA. STAT. § 61.13 (2)(d)(2004) (no presumption shall arise in favor or against a relocation by primary residential parent); *In re* Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005); Fohey v. Knickerbocker, 130 S.W.3d 730 (Mo. App. 2004).

68. *See* Lewellyn v. Lewellyn, 93 S.W.3d 681 (Ark. 2002); Farag v. DeLawter, 743 N.E.2d 366 (Ind. Ct. App. 2001); Landis v. Landis, 869 A.2d 1003 (Pa. Super. Ct. 2005); Graham v. Graham, 2005 WL 1467878 (Tenn. Ct. App. June 22, 2005) (unpublished); Hoover (Letourneau) v. Hoover, 764 A.2d 1192 (Vt. 2000). *See also* TENN. CODE ANN. § 36-6-108 (2004) (where parents are spending substantially equal amounts of time with child, no presumption in favor of either parent arises when one parent seeks to relocate).

69. Tropea v. Tropea, 145, 151-52 (N.Y. 1996) (stating that ". . . bright line rules in this area are inappropriate; each case must be evaluated on its own merits.").

70. Bodne v. Bodne, 588 S.E.2d 728 (Ga. 2003) (finding that physician father's proposed move to Alabama to "leave behind" his predivorce life was putting his interests above his children and changing custody to the mother).

71. *In re* Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005).

72. Gruber v. Gruber, 583 A.2d 434, 437 (Pa. Super. Ct. 1990). *See also In re* Marriage of Stahl, 810 N.E.2d 259 (Ill. App. Ct. 2004) (finding that a determination of the child's best interests cannot be reduced to a "bright line rule" but requires a case by case analysis).

73. For criticisms of the best interests test, *see* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TULANE L. REV. 1365 (1986).

74. LA. REV. STAT. § 9:355.12 (2003). *See also* Gary A. Debele, *A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard*, 15 AM. ACAD. MATRIMONIAL L. J. 75 (1998).

75. COLO. REV. STAT. ANN. § 14-10-124(1.5)(a)(I)-(XI) (2004); COLO. REV. STAT. ANN. § 14-10-129 (I)–(IX) (2004).

76. *See* ARIZ. REV. STAT. ANN. § 25-408 (2004); FLA. STAT. ANN. § 61.13 (2004); KAN. STAT. ANN. § 60-1620(c) (2005); MICH. COMP. LAWS ANN. § 722.31 (2004); TENN. CODE ANN. § 36-6-108 (2004); UTAH CODE ANN. § 30-3-37 (2004); and WASH. REV. CODE ANN. § 26.09.520 (2004).

77. *See In re* Marriage of Hamilton-Waller, 2005 WL 294687 (Or. App. Nov. 9, 2005)(dissent) (citing Linda D. Elrod, *Current Trends in Custody Relocation* 10-11) (written materials from ABA Council of Appellate Staff Attorneys Seminar, July 30, 2005)(summarizing factors). *See also* Baures v. Lewis, 770 A.2d 214, 229-30 (N.J. 2001); Hollandsworth v. Knyzewski, 109 S.W.3d 653 (Ark. 2003); *In re* Marriage of LaMusga, 88 P.3d 81 (Cal. 2004); Auge v. Auge, 665 N.E.2d 145 (Minn. 1983); McLaughlin v. McLaughlin, 647 N.W.2d 577 (Neb. 2002); Schwartz v. Schwartz, 812

P.2d 1268 (Nev. 1991); Stout v. Stout, 560 N.W.2d 903 (N.D. 1997); Gruber v. Gruber, 583 A.2d 434 (Pa. Super. Ct. 1990).

78. Bretherton v. Bretherton, 805 A.2d 766, 770 (Conn. App. Ct. 2002).

79. *In re* Marriage of LaMusga, 88 P.3d 81 (Cal. 2004); Dupre v. Dupre, 857 A.2d 242 (R.I. 2004); *In re* Marriage of Pape, 989 P.2d 1120 (Wash. 2000).

80. Bauers v. Lewis, 770 A.2d 214, 217 (N.J. 2001) (noting that ". . . In our global economy, relocation for employment purposes is common. On a personal level, people remarry and move away . . .").

81. ALI PRINCIPLES, *supra* note 7, at § 2.17(4)(a)(ii).

82. Dupre v. Dupre, 857 A.2d 242 (R.I. 2004).

83. Hawkes v. Spence, 878 A.2d 273 (Vt. 2005).

84. W. VA. CODE § 48-9-403(d)(1) (2004).

85. *See* Hass v. Hass, 44 S.W.3d 773 (Ark. Ct. App. 2001); Botterbusch v. Botterbusch, 851 So. 2d 903, 905 (Fla. Dist. Ct. App. 2003); *In re* Marriage of Parr, 802 N.E.2d 393 (Ill. App. Ct. 2003); *In re* S.E.P., 35 S.W.3d 862 (Mo. Ct. App. 2001); McLaughlin v. McLaughlin, 647 N.W.2d 577 (Neb. 2002); Long v. Long, 675 N.Y.S.2d 673 (1998); Tibor v. Tibor, 598 N.W.2d 480 (N.D. 1999); Keller v. Keller, 584 N.W.2d 509 (N.D.1998); Perrott v. Perrott, 713 A.2d 666 (Pa. Super. Ct. 1998).

86. *See* Leach v. Santiago, 798 N.Y.S.2d 242 (App. Div. 2005); Levine v. Bacon, 687 A.2d. 1057 (N.J. Super. App. Div. 1997) (denying move where the father failed to look for a job in the current location); Baldwin v. Baldwin, 710 A.2d 610 (Pa. Super. Ct. 1998); Sullivan v. Knick, 568 S.E.2d 430 (Va. Ct. App. 2002).

87. Dickson v. Dickson, 634 N.W.2d 76 (N.D. 2001).

88. *See In re* Marriage of Sale, 808 N.E.2d 1125 (Ill. App. Ct. 2004); Tremain v. Tremain, 646 N.W.2d 661 (Neb. 2002); Fohey v. Knickerbocker, 130 S.W.3d 730 (Mo. Ct. App. 2004).

89. *See* Hales v. Edlund, 78 Cal. Rptr. 2d 671 (Ct. App. 1998); Oliver v. Oliver, 855 A.2d 1022 (Conn. App. Ct. 2004); *In re* Marriage of Collingbourne, 791 N.E.2d 532 (Ill. 2003); Rosenthal v. Maney, 745 N.E.2d 350 (Mass. App. Ct. 2001); Caudill v. Foley, 21 S.W.3d 203 (Tenn. Ct. App. 1999).

90. *See* Reel v. Harrison, 60 P.3d 480 (Nev. 2002); Aziz v. Aziz, 779 N.Y.S.2d 539 (App. Div. 2004); Paulson v. Bauske, 574 N.W.2d 801 (N.D. 1998).

91. Geiger v. Yaeger, 846 A.2d 691 (Pa. Super. Ct. 2004).

92. Flynn v. Flynn, 92 P.3d 1224 (Nev. 2004) (denying mother's relocation to enroll in a Theology program when degree would not enhance earning ability, educational opportunities existed in area and child's lifestyle would not be enhanced by the move).

93. *See* Bodne v. Bodne, 588 S.E.2d 728 (Ga. 2003); Jones v. Jones, 903 S.W.2d 277 (Mo. App. Ct. 1995); Tishmack v. Tishmack, 611 N.W.2d 204 (N.D. 2000).

94. Cassady v. Signorelli, 56 Cal. Rptr. 2d 545 (Ct. App. 1996).

95. *See*Delgado v. Nazario 677 N.Y.S.2d 336 (App. Div. 1998).

96. *See* Dymitro v. Dymitro, 927 P.2d 917 (Idaho Ct. App. 1996); Shunk v. Walker, 589 A.2d 1303 (Md. Spec. Ct. App. 1991); *In re* Marriage of Cook, 725 P.2d 562 (Mont. 1986); Leach v. Santiago, 798 N.Y.S.2d 242 (App. Div. 2005) (changing custody to father partly because of mother's actions in leaving child with grandmother while she moved and not telling father).

97. *In re* T.M., 831 N.E.2d 526 (Ohio App. 2005). For further discussion of parental alienation, see Janet R. Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 FAM. L. Q. 757 (2005; Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527 (2001).

98. Tibor v. Tibor, 598 N.W.2d 480 (N.D. 1999) (father had entered house to check messages and rummage through trash).

99. Jack v. Clinton, 609 N.W.2d 328 (Neb. 2000).

100. Winn v. Winn, 593 N.W.2d 662, 669 (Mich. Ct. App. 2000)(emphasis added).

101. Frieze v. Frieze, 692 N.W.2d 912 (N.D. 2005); Winn v. Winn, 593 N.W.2d 662, 669 (Mich. Ct. App. 2000).

102. *See* Schmidt v. Bakke, 691 N.W.2d 239 (N.D. 2005); Aziz v. Aziz, 779 N.Y.2d 539 (2nd Dep't 2004).

103. *See* Hanks v. Arnold, 674 N.E.2d 1005 (Ind. Ct. App. 1996); Dale v. Pearson, 555 N.W.2d 243 (Iowa Ct. App. 1996); *In re* Marriage of Tade, 938 P.2d 673 (Mont. 1997). *See* Jay M. Zitter, Annotation, *Custodial Parent's Relocation as Grounds for Change of Custody*, 70 A.L.R.5th 377 (1999).

104. Brennan v. Brennan, 857 A.2d 927 (Conn. App. Ct. 2004).

105. Classick v. Classick, 155 S.W.3d 842 (Mo. Ct. App. 2005).

106. Hardin v. Hardin, 618 S.E.2d 169 (Ga. Ct. App. 2005).

107. *See* Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions For Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297, 309 (2000)(concluding that "[r]egardless of who has been the primary caretaker . . . children benefit from the extensive contact with both parents that fosters meaningful father-child and mother-child relationships"); Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 318 (1996) (concluding that "[w]hen a child is de facto in the primary residential or physical custody of one parent, that parent should be able to relocate with the child, except in unusual circumstances").

108. *See High Conflict Custody Cases: Reforming the System for Children–Conference Report and Action Plan*, 34 FAM. L.Q. 589 (2001); Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 515 (2001).

109. Paul Amato & Joan Gilbreth, *Non-resident Father's and Children's Well-Being: A Meta Analysis*, 61 J. MARRIAGE & FAMILY 557, 560 (1999) (". . . contact with nonresident fathers following divorce is associated with positive outcomes among children when parents have a cooperative relationship but is associated with negative outcomes when parents have a conflicted relationship").

110. Sanford L. Braver, et al., *Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations*, 17 J. FAM. PSYCHOLOGY 206 (2003).

111. *See In re* Marriage of Ciesluk, 113 P.3d 135, 149 (Colo. 2005)(criticizing trial court reliance on Braver article); Brief of Dr. Judith Wallerstein in *In re* Marriage of LaMusga, 16-18 (. . . the youngsters in the custody of their fathers when the mother moved or who moved with the father were the only young people who showed trou-

bled behavior). Trish Wilson, *Post-Divorce Relocating with Mothers Do Best: So Why Does the Braver Study Hide Its Own Results*, Pt. I, 9(1) DOM. VIOL. REP'T (2003); Pt. II, 9(2) DOM. VIOL. REP'T 19 (2004); Pt. III, 9(3) DOM. VIOL. REP'T 37 (2004) (showing that study shows that the children who fared best overall were those whose noncustodial fathers moved). Norval Glenn & David Blankenhorn, Institute for American Values, Sept. 11, 2003 (stating the "Braver study is a weak one that provides no credible evidence on the effects on children of moving away after divorce"). *See also* Carol S. Burch, Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law, 40 Fam. L.Q. (2006), 285.

112. Landis v. Landis, 869 A.2d 1003 (Pa. Super. Ct. 2005) (reversing trial judge who denied relocation because the existing shared custody arrangement could not stay in place but ignored the father's indirect criminal contempt conviction, the Protection from Abuse Order that was in place, and the criminal charges against father for weapons violations).

113. Moeller-Prokosch v. Prokosch, 27 P.3d 314 (Alaska 2001); McCoy v. McCoy, 764 A.2d 449 (N.J. Super. Ct. App. Div. 2001); Billhime v. Billhime, 869 A.2d 1031 (Pa. Super. Ct. 2005).

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

115. Kimberly R. Shefts, *Virtual Visitation: The Next Generation of Options for Parent-Child Communication*, 36 FAM. L.Q. 303 (2002); Sarah Gottfried, *Virtual Visitation: The Wave of the Future in Communication Between Children and Non-Custodial Parents in Relocation Cases*, 36 FAM. L.Q. 475 (2002). *See also* William C. Smith, *Just Wait Until Your Dad Logs On!*, 87 A.B.A. J. 24 (Sept. 2001).

116. Rice v. Rice, 517 S.E.2d 220, 227-28 (S.C. Ct. App. 1999).

117. *See In re* Marriage of Thielges, 623 N.W.2d 232 (Iowa Ct. App. 2000); McGuinness v. McGuinness, 970 P.2d 1074 (Nev. 1998); Chen v. Heller, 759 A.2d 873 (N.J. Super. Ct. App. Div. 2000); Surma v. Surma, 561 N.W.2d 290 (N.D. 1997).

118. Arnold v. Arnold, 847 A.2d 674 (Pa. Super. Ct. 2004). *See In re* Marriage of Condon, 62 Cal. Rptr. 2d 33 (Ct. App. 1998)(Australia); Hayes v. Gallacher, 972 P.2d 1138 (Nev. 1999)(Japan); Goldfarb v. Goldfarb, 861 A.2d 340 (Pa. Super. Ct. 2004).

119. Lazarevic v. Fogelquist, 668 N.Y.S.2d 320 (App. Div. 1997).

120. ALA. CODE 30-3-169.3 (2004).

121. Bodne v. Bodne, 588 S.E.2d 728 (Ga. 2003)(J. Benham, dissenting). *See also* Kimberly K. Holtz, *Note: Move Away Custody Disputes: The Implications of Case by Case Analysis and the Need for Legislation*, 45 SANTA CLARA L. REV. 319 (1994).

122. *See In re* Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005); Landis v. Landis, 869 A.2d 1003 (Pa. Super. Ct. 2005); Fowler v. Sowers, 151 S.W.3d 357 (Ky. Ct. App. 2004); Hawkes v. Spence, 878 A.2d 273 (Vt. 2005).

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APPENDIX
State Statutes on Relocation**

STATE	Notice	Presumption For/Against or Burdens	Best Interests of Child Paramount	Recent or Significant Case
Alabama ALA. CODE § 30-3-160 -30-3-169.10	45 days	Against	X	Clements v. Clements, 906 So. 2d 952 (Ala. Civ. App. 2005)
Alaska ALASKA STAT. § 25.24.150			X	Chesser-Witmer v. Chesser, 117 P.3d 711 (Alaska 2005) Moeller-Prokoech v. Prokoech, 53 P.3d 152 (Alaska 2002)
Arizona ARIZ. REV. STAT. § 25-408	60 days	Burden on moving party	X	Woodworth v. Woodworth, 42 P.3d 610 (Ariz. App. 2002)
Arkansas* ARK. CODE ANN. § 9-13-101		For	X	Hollandsworth v. Knyzewski, 109 S.W.3d 653 (Ark. 2003)
California CAL. FAM. CODE § 3406		For	X	*In re* Marriage of LaMusga, 88 P.3d 81 (Cal. 2004)
Colorado COLO. REV. STAT. Ann. § 14-10-129 & 14-10-124		Both parents must show BIOC	X	*In re* Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005)
Connecticut* CONN. GEN. STAT. ANN. § 46b-56		Initial burden on moving party	X	Brennan v. Brennan, 857 A.2d 927 (Conn. App. 2004)
Delaware* 13 DEL. CODE §§ 728 & 729			X	Karen J.M. v. James W., 792 A.2d 1036 (Del. Fam. Ct. 2002)
District of Columbia				
Florida FLA. STAT. ANN. § 61.13(2)(d)			X	Jenson v. Jenson, 904 So. 2d 635 (Fla. Dist. Ct. App. 2005)

APPENDIX (continued)

STATE	Notice	Presumption For/Against or Burdens	Best Interests of Child Paramount	Recent or Significant Case
Georgia GA. CODE ANN. § 19-9-1	30 days		X	Hardin v. Hardin, 618 S.E.2d 169 (Ga. Ct. App. 2005)
Hawaii* HAW. REV. STAT. § 571-46			X	Tetreault v. Tetreault, 55 P.3d 845 (Haw. Ct. App. 2002)
Idaho IDAHO CODE § 32-717		Initial burden on moving party	X	Weiland v. Ruppel, 75 P.3d 176 (Idaho 2003) Roberts v. Roberts, 64 P.3d 327 (Idaho 2003)
Illinois 750 ILL. COMP. STAT. ANN. § 5/609		Burden on party seeking modification	X	*In re* Marriage of Johnson, 815 N.E.2d 1283 (Ill. App. Ct. 2004)
Indiana IND. CODE. ANN. § 31-17-2.2-1		Shifting Burden	X	Bettencourt v. Ford, 822 N.E.2d 989 (Ind. Ct. App. 2005)
Iowa IOWA CODE ANN. § 598.21D		Burden on party seeking modification		*In re* Marriage of Theiges, 623 N.W.2d 232 (Iowa Ct. App. 2000)
Kansas KAN. STAT. ANN. § 60-1620	30 days		X	*In re* Marriage of Whipp, 962 P.2d 1058 (Kan. 1998)
Kentucky* KY. REV. STAT. ANN. § 403.340		Burden on party seeking modification	X	Fowler v. Sowers, 151 S.W.3d 357 (Ky. Ct. App. 2004)
Louisiana LA. REV. STAT. ANN. § 9.355.1-17	60 days	Burden on moving party Presumption against	X	Peacock v. Peacock, 903 So. 2d 506 (La. Ct. App. 2005)
Maine ME. REV. STAT. ANN. TIT. 19-A, §§ 1653 (14) & 1657	30 days	Burden on moving party	X	Fraser v. Boyer, 722 A.2d 354 (Me. 1998)
Maryland MD. CODE ANN., Family Law § 9-106	45 days	Burden on non-moving party		Braun v. Headley, 750 A.2d 624 (Md. Ct. Spec. App. 2000)

STATE	Notice	Presumption For/Against or Burdens	Best Interests of Child Paramount	Recent or Significant Case
Massachusetts MASS. GEN. LAWS ANN. Ch. 208, § 30		"upon cause shown" custodial parent may relocate	X	D.C. v. J.S., 790 N.E.2d 686 (Mass. App. Ct. 2003)
Michigan MICH. COMP. LAWS ANN. § 722.31		Burden on moving party if objected to	X	Grew v. Knox, 694 N.W.2d 772 (Mich. Ct. App. 2005)
Minnesota* MINN. STAT. ANN. § 518.18(d)		Presumption for		*In re* Marriage of Geiger, 470 N.W.2d 704 (Minn. Ct. App. 1991) Auge v. Auge, 665 N.E.2d 145 (Minn. 1983)
Mississippi MISS. CODE ANN. § 93-5-23		Burden on party seeking modification	X	Lambert v. Lambert, 872 So. 2d 679 (Miss. Ct. App. 2004)
Missouri MO. REV. STAT. § 452.377	60 days	Burden on moving party	X	Baxley v. Jarred, 91 S.W.3d 192 (Mo. Ct. App. 2002)
Montana MONT. CODE ANN. § 40-4-217	30 days	Burden on party opposing relocation	X	*In re* Marriage of Robison, 53 P.3d 1279 (Mont. 2002)
Nebraska		Shifting burden	X	Wild v. Wild, 696 N.W.2d 886 (Neb. 2005)
Nevada NEV. REV. STAT. § 125C.200		Shifting burden	X	Potter v. Potter, 119 P.3d 1246 (Nev. 2005)
New Hampshire* N.H. REV. STAT. ANN. § 461-A:12	60 days	Shifting burden	X	*In re* Pfeuffer, 837 A.2d 311 (N.H. 2003)
New Jersey N.J. STAT. ANN. §9:2-2		Shifting burden		Baures v. Lewis, 770 A.2d 214 (N.J. 2001)
New Mexico* N.M. STAT. ANN. §40-4-9.1		Equal burden	X	Jaramillo v. Jaramillo, 823 P.2d 299 (N.M. 1992)

APPENDIX (continued)

STATE	Notice	Presumption For/Against or Burdens	Best Interests of Child Paramount	Recent or Significant Case
New York* McKinney's DRL § 240, C240:25			X	Vega v. Pollack, 800 N.Y.S.2d 442 (App. Div. 2005) Tropea v. Tropea, 665 N.E.2d 146 (N.Y. 1996)
North Carolina N.C. GEN. STAT. ANN. § 50-13.2			X	Evans v. Evans, 530 S.E.2d 576 (N.C. 2000)
North Dakota N.D. CENT. CODE ANN. § 14-09-07		Burden on moving party	X	Schmidt v. Bakke, 691 N.W.2d 239 (SD 2005)
Ohio OHIO REV. CODE § 3109.051	Required but no time specified	Initial burden on moving party	X	Rodkey v. Rodkey, 2006 WL 2441720 (Ohio App.)
Oklahoma OKLA. STAT. ANN. Tit. 43 § 1		For		Casey v. Casey, 58 P.3d 763 (Okla. 2003)
Oregon OR. REV. STAT. ANN. § 107.159			X	*In re* Marriage of Colson & Piel, 51 P.3d 607 (Or. Ct. App. 2002)
Pennsylvania 23 PA CONS. STAT. ANN. § 5308		Shifting burden	X	Billhime v. Billhime, 869 A.2d 1031 (Pa. Super. Ct. 2005); Gruber v. Gruber, 583 A.2d 434 (Pa. Super. Ct. 1990)
Rhode Island R.I. GEN. LAWS ANN. § 15-5-16			X	Dupre v. Dupre, 857 A.2d 242 (R.I. 2004)
South Carolina* S.C. CODE ANN. § 20-3-160	45 days		X	Latimer v. Farmer, 602 S.E.2d 32 (S.C. 2004)
South Dakota S.D. CODIFIED LAWS § 25-5-13; 25-4A-17 - 19	45 days	For	X	Fossum v. Fossum, 545 N.W.2d 828 (S.D. 1996)

STATE	Notice	Presumption For/Against or Burdens	Best Interests of Child Paramount	Recent or Significant Case
Tennessee TENN. CODE ANN. §36-6-108	60 days	Depends on custodial parent's time spent w/ child	X	Kawatra v. Kawatra, 182 S.W.3d 800 (Tenn. 2005)
Texas* TEX. FAM. CODE § 156.101		Burden on moving parent	X	Echols v. Olivarez, 85 S.W.3d 475 (Tex. App. 2002); Bates v. Tesar, 81 S.W.3d 411 (Tex. App. 2002)
Utah UTAH CODE ANN. § 30-3-37	60 days			
Vermont* VT. STAT. ANN. Tit. 15, § 668		Burden on non-custodial party	X	Hawkes v. Spence, 878 A.2d 273 (Vt. 2005) Lacaillade v. Hardaker, 878 A.2d 273 (Vt. 2005)
Virginia VA. CODE ANN. § 20-124.5	30 days			Riggins v. O'Brien, 538 S.E.2d 320 (Va. Ct. App. 2000)
Washington WASH. REV. CODE ANN. § 26.09.520-.560		For	X	Ramirez v. Holland, 93 P.3d 951 (Wash. Ct. App. 2004) *In re* Marriage of Horner, 93 P.3d 124 (Wash. 2004)
West Virginia W. VA. CODE § 48-9-403	60 days	Based on amount of time spent with child	X	Cunningham v. Cunningham, 423 S.E.2d 638 (W. Va. 1992)
Wisconsin WIS. STAT. ANN. § 767.327	60 days	Rebuttable presumption for		Hughes v. Hughes, 588 N.W.2d 823 (Wis. Ct. App. 1998)
Wyoming* WYO. STAT. ANN. § 20-2-204(c)		For	X	Harshberger v. Harshberger, 117 P.3d 1244 (Wyo. 2005)

*Denotes general custody statute

**The author prepared an earlier version of this chart which appeared in *States Differ on Relocation: A Panorama of Expanding Case Law*, 28 (4) FAM. ADVOC. 8 (ABA 2006).

APPENDIX K

A Study of Post-Separation/Divorce Parental Relocation

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2.0 Literature Review

One of the most frequently contested issues in the family courts is whether a parent may relocate with a child, moving away from the locale where both parents lived after their separation, thus affecting the child's relationship with the non-moving parent. In general, the issue that is litigated is a proposed move of a parent with a child to a new location some distance away from the non-moving parent. There is a growing international literature on the effects of relocation and litigation on children. This literature is helpful for policy makers, judges, lawyers and parents in providing a better understanding of the nature and dynamics of these cases. However, this literature reveals the complexity and fluidity of these cases rather than suggesting that simple rules can be developed for resolving these cases, and the literature can be very difficult to apply to individual cases.

In this chapter we identify themes and review the leading articles in the literature on relocation. Limitations of space (and time for carrying out this project) prevent this from being an exhaustive review of all literature on relocation; in particular we have not included discussion of some of the secondary literature that merely summarizes or critiques primary research studies. The chapter begins with a brief review of legal literature that identifies the major legal issues in relocation cases and the differing approaches to relocation in various countries. We then review some of the literature that describes the challenges in settling relocation disputes. The chapter then considers the most significant social science studies on relocation, considering first research on the effects of relocation on children and then recent studies on families involved in relocation litigation in different countries. We conclude by summarizing the key findings and trends in the literature, and commenting on the value and limitations of the existing social science literature on relocation.

2.1 The nature of relocation disputes and differing legal approaches

Parental relocation cases reflect the reality that after separation there are often very important economic and social reasons for former spouses to want to move away from the locale where they shared a residence (Bala & Harris, 2006). The increase in the number of relocation cases also reflects the gradual, but sustained, increase in the involvement of fathers in parenting in intact families, and their desire to maintain an active involvement in the lives of their children after separation (Parkinson, 2011). Technological changes have also had an interesting relationship to

relocation issues, as inexpensive long distance telephone calls, email and webcams can facilitate contact between parents and children. In addition, the internet is playing a role in more individuals finding distant new partners and wanting to move to pursue these long distance relationships.

There are a number of very different legal approaches to the resolution of relocation disputes, all claiming to promote the welfare of children. Some argue that there should be a presumption in favour of allowing the custodial parent, usually the mother, to relocate, as that parent has the primary responsibility for the welfare of the child; promotion of her social or economic well-being will usually promote the welfare of the child (e.g., Wallerstein & Tanke, 1996). Some jurisdictions have adopted this approach.[1] Others argue that a presumption against moving a child is most appropriate, since children will generally benefit from stability and maintaining relationships that will inevitably be affected if the custodial parent moves with the child (Braver, Ellman & Fabricius, 2003; Warshak, 2003), and a few jurisdictions have adopted this approach.[2]

Since the 1996 Supreme Court of Canada decision in *Gordon v. Goertz,*[3] Canadian judges have had to follow a "best interests of the child" approach that, at least in theory, requires an individualized assessment in each case, without any presumption or onus. Although far from universally accepted in the United States, the dominant trend in that country is also a best interests approach, without a presumption for or against relocation. This is also the approach in Australia and New Zealand.

The reality of relocation cases is that while the test that Canadian courts use in making the decision is intended to promote the best interests of the children involved, in individual cases judges are forced to choose between a small number of alternatives, each of which may result in the child being less well-off in some significant respect than before the litigation commenced. The options are usually stark, and all may have potential negative effects on the child (Waldron, 2005). The court is often faced with just two choices:

- If the custodial parent is permitted to move with the child, this will inevitably strain, and sometimes effectively sever, the child's relationship with the parent left behind; or
- If the former custodial parent will move without the child if court approval for relocation is not obtained, the change in the child's living arrangements will be emotionally disruptive to the child, and the relationship with the parent who moves away will suffer.

In some cases there are other, less common, options. A third option involves the custodial parent stating that if the court refuses permission for relocation, they will not move without the child. If this option is exercised, however, the child's welfare may still be negatively affected. In some of these cases, the child's welfare will be directly affected, as the child may, for example, be deprived of the opportunity of an increase in standard of living. This outcome may also indirectly negatively affect the child, since refusing to allow the custodial parent to move will very likely cause some unhappiness to that parent, and in some cases may contribute to clinical depression of the custodial parent (Henaghan, 2011). There is a concern that a parent in this situation may unconsciously "blame" the child for having deprived her[4] of some social or economic opportunity, and some Canadian decisions have held that it is inappropriate for a court to place weight on the response of an applicant parent to the question of what she will do if her application for relocation is denied.[5]

Other less common options are that both parents move to the new location, or the custodial parent's new spouse moves to the custodial parent's location.

Judges can and sometimes do impose conditions on the parents who are permitted to relocate in order to promote the welfare of the children involved. However, whatever the outcome, there is a significant likelihood that the children will in some way be worse off after the proceedings than before. While in theory the court is making a decision based on an assessment of the "best interests" of the children, in reality the judge is often choosing the "least detrimental alternative."

It is important to appreciate that the law is only involved when the custodial parent (usually the mother) wants to move (and the other parent opposes the move). It is not uncommon for non-custodial parents (usually fathers) to move after separation, which often results in much less contact with their children, and sometimes in the virtual disappearance of these parents from the lives of their children. The unilateral decision of the non-custodial parent (usually the father) to move away often has a negative effect on the well-being of his children, but there is no legal regulation of such a move. On the other hand, if non-custodial parents want to maintain a relationship with their children, they too will be restricted in where they can live, and there is some evidence that for many separated parents their children are "anchors," keeping them in relatively close proximity to the former family home and each other (Parkinson, 2011).

2.2 The challenge of settling relocation cases

In one study that considered the difficulty in settling these cases, Parkinson and Cashmore (2009) reported that in Australia, approximately 6 percent of family law cases require a judicial disposition, while in contrast, the authors found that 59 percent of cases involving parental relocation required a determination by a judge. A New Zealand study found that 51 percent of the relocation cases required court intervention to be resolved (Taylor, Gollop, & Henaghan, 2010). Further, of the relocation cases that do settle prior to a judicial ruling, many are resolved after the litigation process is quite advanced or even after the start of the trial.

One major reason for the low rates of settlement of these cases without judicial determination is that there is typically no middle ground for reaching a compromise (Parkinson, Cashmore, & Single, 2010). In these cases, the two sides are very much at polar opposites – either the primary caregiver (usually the mother) who wishes to move will relocate or she will not, and the father will choose to move to the same location as the mother and child or he will not. When faced with such mutually exclusive options, there is frequently very little room for negotiation and compromise. Further, the appellate jurisprudence gives judges significant discretion, making it more difficult to predict the outcome if a matter does go to trial, further complicating the prospects for settlement.

Cases in which parents have separated and one parent seeks to relocate with the children pose great challenges for judges and lawyers, as well for the parents and children involved. Similar to the situation in Australia and New Zealand discussed above, in Canada these cases tend to be more bitterly contested than other family law cases, as there may be no middle ground for a compromise, and a significant portion of all family law cases that go to trial feature relocation as the central issue. Further, the test that Canadian courts use to decide whether to permit a parent to relocate with

children – the "best interests of the child" – gives trial judges substantial discretion to examine and assess all of the circumstances of a case, making outcomes difficult to predict and settlements harder to negotiate (Bala & Harris, 2006; Henaghan, 2011).

2.3 Studies on the effects of relocation

While disputes involving parental relocation are among the most frequently contested cases in family law, this area has not been the subject of very much social science research. There is a growing though still small body of social science literature on the effects of relocation on both intact and separated families. However, the bulk of this research looks at the impact of relocation on family members in a general context of changes in residence rather than specifically in the area of family breakdown (Taylor et al., 2010). There have been two broad methodological approaches to the more direct study of relocation: one is retrospective and focuses on children (or young adults) who experienced parental separation and/or relocation; the other is to focus more specifically on relocation cases that are contested (or that were contested). The remainder of this chapter reviews the available social science literature on parental relocation, grouping the studies by methodological approach.

Wallerstein and Tanke (1996) published one of the first reports examining the issue of parental relocation following separation. This study was based on a 1995 *amicus curiae* brief filed by Wallerstein in the California relocation case of *In re Marriage of Burgess*. Drawing on earlier theories of attachment suggesting that children need the benefit of a strong bond to one primary parent (e.g., Goldstein, Freud, & Solnit, 1973), Wallerstein and Tanke (1996) argued that in cases where the primary parent (typically the mother) wishes to relocate with her children, there should be a presumption to allow the move, since a disruption of this primary attachment bond would be detrimental to the children involved. Wallerstein and Tanke (1996) do note, however, that in cases where both parents have been closely involved in child rearing, the issues may be less straightforward.

Wallerstein and Tanke's (1996) position has been criticized on both methodological and theoretical grounds (e.g., Pasahow, 2005; Warshak, 2000, 2003). Warshak (2000) pointed out that Wallerstein and Tanke's (1996) position advocating allowing custodial parents to relocate was based on only ten references, seven of which were published by Wallerstein's research team. Further, Wallerstein's empirical research only included six families that experienced relocation during the study and thus data directly related to relocation were very limited. In contrast, Warshak (2000) asserts that his examination of over 75 social science studies suggests that it is in a child's best interests to remain within easy access of both parents. Warshak's review was based on studies of the effects of relocation on children in both intact and divorced families, as well as studies on the effects of parents on the psychological development of children, the effects of parental absence, the impact of divorce, the effects of different custodial arrangements, and the effects of remarriage. Warshak (2000) argues that Wallerstein's position "ignores the broad consensus of professional opinion, based on a large body of evidence, that children normally develop close attachments to both parents, and that they do best when they have the opportunity to establish and maintain such attachments" (p. 85).

Warshak further argues that most of the studies that are used in support of the importance of the attachment bond between primary caregivers and children report correlational, rather than causal, relationships. As Warshak (2000) observes: "when parent and child adjustment go together, we must also consider the possibility that it is the child's adjustment that influences the parent's adjustment, or that a third factor is the causal agent linking the two factors together" (p. 88). In addition, many of the studies collect data on how well the child is doing only from the mother, which "may inflate the correlations between mother and child adjustment because of the influence of the mother's own emotional state on her perceptions of her children" (p. 88).

A contrasting school of thought from that advanced by Wallerstein and her colleagues argues that, in most families, children form close attachments with both parents, not just the primary caregiver and, in order to ameliorate the risks associated with parental relationship breakdown, it is important to maintain ongoing and frequent contact with both parents following separation (Kelly, 2000, 2007; Kelly & Lamb, 2003; Stahl, 2006; Warshak, 2000, 2003). According to this perspective, the best interests of the individual child should be the paramount consideration in decisions regarding relocation, rather than a presumption that the primary caregiver should be allowed to relocate if she desires.

One of the strongest statements of concern about the effects of relocation on young children was articulated by the American mental health professionals Joan Kelly and Michael Lamb in a 2003 article. They raised concerns about whether a child who is not able to see a parent on a regular basis in the early years of life will be able to form a proper psychological attachment to that parent. In a passage cited by some Canadian judges, they wrote:

> Because attachments are more fragile in the earliest phases of formation, it is likely that younger children are more vulnerable to disruptions in attachment formation and consolidation. In assessing the potential psychological risks associated with relocation ... therefore, it is crucial to consider the child's age and phase of the attachment process when the non-moving parent has been involved in parenting, even if he or she has spent as little as a day or two each week with the child since the separation. It would be ideal if divorced parents wishing to relocate could be persuaded to wait until their children are at least 2 or 3 years old, because the children would then be better equipped with the cognitive and language skills necessary to maintain long-distance relationships, particularly when formidable distances separate them from one of their parents (p. 196).[6]

They further suggest that if parents are more than an hour's drive away from one another, it will be difficult to maintain frequent contact and a strong parent-child tie. Other mental health professionals raise similar concerns about relocation of young children disrupting attachment with the non-moving parent, and being distressing for a child if it results in the rupturing of a strong, positive bond with a parent figure. However, other writers also observe that if there is not a strong attachment to the non-moving parent, relocation at a young age is less disruptive to a child as community and peer attachments are not significant in this age group (Taylor et al., 2010; Waldron, 2005).

While Kelly and Lamb raise concerns about relocation somewhat more forcefully than some other

mental health professionals, most researchers emphasize that the risks of relocation for any child must be weighed against the benefits for the individual child, and most of the recent writing by mental health professionals does *not* advocate a legal presumption against allowing relocation, but rather advocates a "child focused" approach (Austin, 2008; Stahl, 2006). Even Kelly and Lamb (2003) emphasize that both costs and benefits exist in any potential relocation case, and these must be compared and assessed in determining how the children's best interests should be met:

> When relocations offer mentally healthy, competent, and committed custodial parents improved occupational, educational, or marital opportunities ... their children are likely to benefit from the parents' enhanced psychological well-being, particularly if they are able to maintain meaningful relationships with involved and competent non-moving parents through regular contact. If the children concerned have tenuous, nonexistent, or deeply disturbed relationships with non-moving parents ... the benefits of relocation likely outweigh the costs and relocation might be desirable. (p. 202)

Norford and Medway (2002) examined the social adjustment of a group of 408 American high school students who fell into one of three groups: frequent movers (6 to 13 relocations); moderate movers (3 to 5 relocations); and non-movers. The study also collected data on the primary reason for the move, and interviewed the mothers of 67 of the students in the frequent mover group. The findings indicated that students who had moved as a result of their parents' separation or divorce participated in a significantly lower number of extracurricular activities as the number of moves they experienced increased. This effect was not significant for students who moved for reasons other than parental separation or divorce. However, they did not find a significant relationship between whether a student moved following parental relationship breakdown and negative social and emotional adjustment. Instead, it was found that maternal attitude towards relocation was related to students' psychological adjustment: students who were frequent movers and whose mothers reported a negative attitude towards relocation were more likely to suffer from depression. It should be noted, however, that this study did not account for the distance involved in the relocation, changes in socioeconomic status as a result of relationship breakdown, or the nature of the students' relationship with the non-relocating parent, and thus could not examine the effects of changes in the nature of that relationship on students' social and emotional adjustment. Further, this study did not include students who experienced one or two moves, and thus no conclusions can be drawn about the effects of low frequency mobility.

A study by Braver, Ellman and Fabricius (2003) attempted to examine the long-term effects of relocation on children's adjustment, well-being, and long term relationship with their parents by surveying college students enrolled in an introductory psychology class whose parents had divorced at some point during their childhoods. In some cases, the parents remained in close proximity to each other following the divorce; the responses of students who reported these circumstances were compared with those of young adults who reported that at least one parent had moved more than one hour's drive from their prior residence following the divorce. The final sample consisted of 602 college students whose parents had divorced at some point during their childhood. Respondents were classified into one of five possible groups: (1) neither parent moved more than one hour from

the family home following the divorce; (2) the mother moved more than one hour away and the child moved with her; (3) the mother moved more than one hour away and the child remained with the father; (4) the father moved more than one hour away and the child moved with him; or (5) the father moved more than one hour away and the child remained with the mother. In cases where both parents had moved more than one hour away from the family home, respondents were asked which parent moved first.

Braver et al. (2003) found that young people who reported that one parent had moved at least one hour away following their divorce (either with or without the child) fared worse on measures of their current financial, psychological, social and emotional well-being. Specifically, compared to respondents who reported that neither parent moved more than one hour away, students whose parents moved either with or without them received less financial support from their parents, experienced higher levels of hostility in their relationships with others, reported being more distressed by their parents' divorce, rated their parents more negatively as role models and sources of social support, indicated that the nature of their parents' relationships with each other was worse, and rated themselves more negatively on measures of physical health, life satisfaction and adjustment. Based on these findings, Braver et al. (2003) argued against a presumption that custodial parents should be allowed to relocate with their children.

While the data reported by Braver et al. (2003) provide evidence of a relationship between parental relocation following divorce and negative outcomes for children, it is important to note that these findings are correlational rather than causal. It is impossible to conclude that the relocation of one parent following divorce caused the subsequent negative outcomes for the children; the possibility of the existence of other factors that are responsible for both parental relocation and negative outcomes for children must be acknowledged. As Braver et al. (2003) observe, "preexisting factors that could plausibly play this role include a low level of functioning for one or both parents, the inability of one or both parents to put the child's needs ahead of his or her own, and high levels of pre-move conflict between the parents..." (pp. 214-215). A further limitation of this research concerns the use of college students as respondents in this study. A sample of college students cannot be assumed to be representative of the population of young people who have experienced their parents' divorce. It is likely that college students, in general, represent a somewhat more affluent and better educated group than the population as a whole, and thus may include those individuals who are likely to be most resilient to adverse life events.

Austin (2008) argued that the early work of Wallerstein and her colleagues, focusing on attachment bonds between children and their caregivers, did not take account of research findings from large-scale and representative population studies that provided evidence that there can be negative effects from relocation on children, even in intact families, and that these effects are potentially exacerbated in non-intact families. According to Austin (2008), these negative effects of relocation include "school behavior problems, [lack of] academic success, [lower] school graduation...rates, [higher] teen pregnancy, [earlier] age of first sexual activity, [reduced] child well-being, and [greater] amount of idle time" (p. 140). These negative effects occurred even after controlling for family income. Austin based his review on the research literature relevant to understanding the complex issues surrounding relocation and custody decisions. He cited studies on relocation in general and the effects of mobility on children's adjustment, and examined the idea that mobility is one of many

stressors following relationship breakdown. Children from separated and divorced families may be at a higher risk for adjustment and psychological difficulties and relocation represents another risk factor that may have a further negative impact on children's outcomes (Austin, 2008; Waldron, 2005). It is important to note that Austin acknowledged that the research in this area is just beginning, and he cautioned against over-interpreting the research findings that are available. He stated:

> It would be unsound to use the research reviewed here as a basis for a presumption or bias against relocation of a child with a parent who aspires to relocate because of the salient social policy issues that surround relocation cases. Relocation disputes are inherently driven by the facts of the case and the particulars of the family context. (p. 147)

2.4 Studies of relocation cases

There have been a few recent studies from the United Kingdom, Australia and New Zealand that have focused on the experiences of parents and children with a history of direct involvement in relocation litigation.

A recent qualitative study conducted in the United Kingdom (Freeman, 2009) interviewed 36 parents who had been involved in relocation cases that had either been resolved by settlement by the parties or by judicial determination. Both parties were interviewed in two cases; thus, the sample consisted of 34 separate cases of which 33 involved international moves. Twenty-five of the interviews were conducted with fathers, 2 of whom wished to move with their children and 23 who were opposing proposed moves by their former partners. The 11 interviews conducted with mothers all involved cases where the mother wished to relocate with her children. In 22 of the 34 cases, the proposed relocation was allowed.

Freeman's (2009) small-scale study found that, even in cases where explicit provisions for ongoing contact with the non-residential parent were made at the time of relocation, there was frequently difficulty in exercising that contact. The costs and logistics of international travel frequently made it difficult for fathers to maintain contact, and arrangements that had been agreed upon at the time of relocation were often not honoured. Fathers whose children had relocated reported on the emotional turmoil the resulting loss of regular contact caused for themselves and their own parents. It should be noted that, in studies such as these, individuals who are satisfied with the outcome of their relocation cases may be less likely to volunteer to participate, thus calling into question the representativeness of the study sample. This potential bias is further suggested by the preponderance of fathers whose children had been allowed to relocate with their mothers, a group that is frequently dissatisfied with the outcome of their case.

Behrens, Smyth and Kaspiew (2009) conducted a retrospective qualitative study of a number of Australian parents who had been involved in relocation disputes. The study involved an analysis of all 200 contested relocation cases in the Family Court of Australia from 2002 to 2004, and in-depth interviews with a sample of 38 parents drawn from these cases (27 fathers and 11 mothers). The analysis of court decisions revealed the following findings:

- 90 percent of the individuals who wanted to relocate were female;

- in 57 percent of the cases, the move was allowed;
- 61 percent of the cases involved a move of 1000 kilometres or more;
- 70 percent of cases involved allegations of violence;
- the major reasons given for wanting to relocate were to be closer to family (33 percent), to be with a new partner (30 percent), and to escape violence (8 percent).

According to Behrens and Smyth (2010), the major themes that emerged from the in-depth interviews with the 38 parents included:

- a high prevalence of high conflict and/or abusive relationships predating the relocation dispute, including a significant minority of short, unhappy relationships with separation occurring during pregnancy or shortly after the birth of a single child;
- the relocation dispute was one of many sources of conflict and dispute between most parents;
- smoother paths after relocation were reported for parents who were in less high conflict relationships, and for whom this was really a "relocation only dispute";
- relocation as a significant point of transition in parent-child relationships, with long-distance parenting falling into one of two patterns: "Separate Homes, Separate Lives" or "Parental Engagement in Both Locations," and only a small number of parents losing contact with their children after relocation;
- those applying to relocate giving complex, multiple reasons for their decision, often including the poor quality of their relationship with the other parent. (p. 19)

It should be noted that the sample, and thus the findings, from the interviews conducted for this study do not include child adjustment measures. Twice as many interviewees had been involved in cases which resulted in an order allowing relocation than not allowing the move, and the majority of respondents interviewed were fathers. Thus, the majority of the sample interviewed represented fathers who had unsuccessfully opposed a relocation application, suggesting that the sample studied should not be viewed as representative of relocation disputes in general. Further, the interview sample did not include both parents in any of the cases, so in all cases the researchers were only able to obtain information regarding one side of the dispute.

A recent study from New Zealand is one of the few research projects on parental relocation to examine the perspectives of both parents and children involved in relocation disputes. Taylor et al. (2010) studied 100 New Zealand families involved in relocations disputes. As with the other studies of families involved in relocation disputes, these parents were recruited through their lawyers, so the study sample is skewed towards relocation cases involving the legal process as opposed to cases in which parents made their plans without court involvement. Approximately one-half of the families had had their relocation dispute resolved by the courts, and the others settled the case, though sometimes after court proceedings were commenced but before trial. The researchers conducted in-depth interviews with 114 parents (73 mothers and 41 fathers) and 44 children ranging in age from 7 through 18 years. Follow-up interviews were conducted with 102 of the initial sample of parents 12 to 18 months after the initial interview to determine the longer term impact of the relocation and any changes in family and contact arrangements.

The objectives of this project were:

- to examine parents' and children's experiences of the outcomes of relocation disputes after an application to relocate has been allowed or refused (by a parent or the Family Court), and to then follow-up these families 12-18 months later;
- to explore the factors associated with the successful adaptation of children who are relocated away from their non-resident parent, and to identify any problems they encounter;
- to determine the short-term and medium-term patterns of contact which develop when children relocate away from their non-resident parent;
- to explore the effects of a decision not to approve a relocation on the relationship between the parents, and the relationship each of them has with their child(ren); and
- to examine (in the fully litigated cases) the accuracy of predictions made by the Family Court about the likely consequences for parents and children of approving or refusing the proposed relocation. (p. 84)

The report of Taylor et al. (2010) presented preliminary results of the study and focused primarily on the findings of the interviews with children. Subsequent reports are planned that will examine the parental data in detail.

The interviews conducted with the children generally indicated their acceptance of and satisfaction with a move. Factors that were found to assist children in adjusting to the move included:

- making friends in the new location and getting involved in extracurricular and sports activities;
- moving closer to extended family members;
- moving at a younger age;
- being able to take personal belongings and pets with them to the new location; and
- having the support of their parents and siblings.

The New Zealand study reveals a fluid pattern of post-trial situations, including a couple of cases where mothers were permitted to relocate with their children by the courts, and did so, but then decided to return. Where mothers were not permitted by the court to move with their children, most of them did not move and reported that their children seemed reasonably content, though a number of these women planned to wait until their children were older and able to "decide for themselves" and then move, generally expecting that their children would want to move with them.

Relocation of children with their mothers often resulted in a significant weakening of relations with the father and his extended family, and in some cases contact effectively ceased. Some of the children who were seeing their fathers regularly complained of the dislocation of the travel and time away from their new communities in order to see their fathers. This study included both domestic (62 percent) and international (38 percent) moves.

A significant number of children continued to maintain contact with their fathers, and some even reported an improved relationship with their fathers as tensions between the parents were reduced by the relocation. The authors of this study (Taylor & Freeman, 2010) offer a tentative conclusion:

> For the most part, the children and young people were relatively happy, well-adjusted, and satisfied with how things had worked out for them and their families. This is not to say that the relocation experience was not difficult or traumatic for some, but rather there was the sense that they had adjusted and moved on. This was particularly true of those children and young people for whom the relocation issue had occurred some years previously. (p. 141)

In the New Zealand study, the worst outcomes were for a relatively small group of cases where a mother's relocation application was denied (or abandoned by her), and she moved anyway, leaving children in the custody of a father who may have had limited involvement in their care prior to this change and quite often had a new family with other children. Although some of these reversals in custody were successful, almost half broke down in a fashion that was distressing or traumatic to the children, with children ultimately being sent by their fathers to live with their mothers.

While the New Zealand project is one of the largest scale studies of parental relocation conducted to date and a great deal of information was collected regarding the perspectives of parents and children involved in relocation disputes, a couple of limitations to the data should be noted. First, the majority of the families included in the study were recruited through private lawyers, meaning that parties with legal aid staff lawyers and self-represented individuals were not included. Thus, the sample of parents included in the study cannot be viewed as necessarily representative of the population of individuals dealing with relocation disputes. Second, parents of children who had a particularly difficult or traumatic experience surrounding the relocation tended to not consent to their children's participation in the project; therefore, the children who were included cannot be viewed as representative of all children involved in relocation cases.

A prospective longitudinal quantitative and qualitative study on relocation is currently underway at the University of Sydney in Australia (Parkinson et al., 2010). The main sample in this study includes 80 parents (40 fathers, 39 mothers, and 1 grandmother who is the primary caregiver). The sample also contains nine former couples; thus this study includes 71 discrete cases. Respondents were located through family lawyers in Australia who were asked to identify relocation cases in their practice that had been resolved within the previous six months. The researchers conducted initial interviews with the participants and follow-up interviews 18 months later. Interviews have also been conducted with 19 children involved in these cases.

Of the 40 female participants, 39 wished to relocate with the children, while one non-custodial mother disputed a proposed move by the father with the children. All 40 fathers involved in the study were disputing a proposed move by their ex-partners. When asked why they sought permission to relocate, most women interviewed provided multiple reasons. The most common reasons given were: (1) to return to their original home or move closer to extended family or friends (63 percent); (2) for lifestyle reasons (including financial) (37 percent); (3) to have a fresh start in a new location (29 percent); (4) to escape violence (11 percent); (5) for work or to start a new job (11 percent); and (6) to pursue educational opportunities for their children (8 percent). Interestingly, when fathers were asked why they thought their former partners wanted to move, the most commonly provided reasons were for lifestyle or financial reasons, to be with a new partner, or to begin a new job; moving to be closer to family and friends was mentioned less frequently by fathers than mothers. None of the

fathers mentioned escaping violence as a reason for the relocation application (Parkinson et al., 2010).

Of the 71 cases included in this study, 42 were ultimately settled through a judicial disposition. The remaining 29 cases were settled by consent, although Parkinson et al. (2010) point out that the term "consent" in these cases is often misleading. In few of these cases was a mutually acceptable solution reached; a much more common outcome was that one party simply "gave up." In 21 of the 29 cases resolved without a court decision, the father reluctantly agreed to the move, rather than the mother giving up on her plans to relocate. Some of the fathers who ultimately agreed to the move stated that they decided to give up on their own wishes in favour of what they felt were the best interests of their children. Other fathers stated that they abandoned their case when they came to the realization that they were unlikely to win or could not afford to continue with the litigation. In seven cases, the matter was settled by the mothers giving up their plans to move with the children; in two of these cases, the mother did move but left the children with their fathers.

2.5 Summary: The challenges of application of research and prediction

It is important for all of those who are concerned about relocation cases to be familiar with the growing body of social science literature on this subject, but it is also necessary to be aware of its limitations and of the challenges of applying it to individual cases.

Research on relocation cases in the courts indicates that these are difficult cases to settle and more likely to require judicial resolution than other types of custody, access and child-related disputes between parents (Parkinson et al., 2010; Taylor et al., 2010). This also can be very expensive litigation; many parents are financially unable to take these cases to trial, and reach agreements that they would rather not have made in order to avoid taking the case to court.

Some mental health professionals in the 1990s focused on the importance of the child's relationship with the primary caregiver and argued in favour of a presumptive right of primary caregivers to move with their children (Wallerstein & Tanke, 1996). However, most researchers now accept that post-separation relocation is a "risk factor" for children, and recognize that on certain measures, *in general*, children who relocate after separation have more difficulties than children who do not relocate (Austin, 2008; Kelly & Lamb, 2003; Kelly, 2007; Stahl, 2006; Waldron, 2005). There is, however, no research to establish that negative outcomes are *caused by* the relocation, or that the children who in fact relocated would have been better off had they not relocated. There are many factors involved in relocation after separation, and there are often economic and social factors that make the populations who relocate different from those who do not relocate. The studies of children and young adults who relocated did not assess whether there was an option of not relocating, let alone attempt to determine what the effects of not relocating would have been.

Further, the existing research suggests that *most children* who relocate after separation adjust reasonably well and do not appear to suffer significant long-term negative effects (Taylor et al, 2010). *Some* children involved in relocation litigation suffer long-term negative effects, whether they move or they stay. One of the only longitudinal studies of relocation suggests that the worst outcomes may

be for children who do not move with the primary care parent but are left in their original place of residence in the care of the parent who did not previously have primary care (Taylor et al., 2010).

Mental health professionals recognize that any decision about a child is affected by developmental factors, and recommend that, if relocation occurs, plans for continuing contact with the "left behind" parent take account of the child's age and developmental needs. For younger children, relocation may disrupt psychological attachment with a parent who will not be seen on a frequent basis, but the transition to a new home will be easier because the child will not have strong peer, school or community ties (Taylor et al., 2010). For older children, disruption of peer, community and school relationships as a result of relocation are important factors to consider.

Relationships with the "left behind" parent will be affected by relocation, though the nature and extent of the effect will depend on many factors, including the age of the child, the distances involved and resources of the parents for travel, as well as the nature of the pre-existing relationship between that parent and the child. If a strong, positive relationship with the non-moving parent is disrupted, this will affect the child; if the non-moving parent has had little or no involvement with the child before the move, the child may be little affected by relocation. If the child had a poor relationship with that parent, for example because of issues of violence or abuse, the child may benefit from seeing that parent less (or not all) because of the move.

Significant contact with the non-moving parent is likely to be disrupted by relocation and the relationship may possibly wither away if there is relocation and there has been a high conflict parental separation, or there are family violence, parental mental health or substance abuse issues (Behrens & Smyth, 2010; Taylor et al., 2010). The cost of travel relative to parental means is also a significant factor resulting in a loss of contact with the non-moving parent.

Most recent writing by mental health researchers recognizes that there are both potential risks and potential benefits for children from relocation, and consequently recommends case-by-case weighing of risks and benefits (Austin, 2008; Kelly & Lamb, 2003; Kelly, 2007; Stahl, 2006; Waldron, 2005). These authors also recognize the importance of canvassing the perspectives and views of older children in making relocation decisions.

As discussed in this chapter, there are important methodological limitations to all of the existing research on relocation and its effects on children due to the small, and often unrepresentative, populations being studied. Further, for ethical, practical and methodological reasons, it is has never been possible to do randomized control trial research on the outcomes for a group of children who were relocated compared to the outcomes for a similar group of children who were not relocated. There are challenges in applying the research to any individual case because of the complexity of interacting factors, and the inherent unpredictability of the relocation (or non-relocation) on children and their parents.

Almost a decade ago, psychologist Richard Warshak, one of the most prominent American writers on the effects of separation on children, acknowledged:

> Relocation brings potential benefits to children along with the hazards.... Weighing and integrating all of these factors is a tall order. Even decisions that appear at first glance to be easy may carry unexpected consequences. (Warshak, 2003, p. 381)

A recent article on relocation by a leading New Zealand legal scholar, Mark Henaghan, commented on the limits of social science research in this area:

> Social science can report the experiences of children and parents after separation, and measure how children cope. The difficulty lies in deciding which variables should be given weight in determining outcomes for each particular child. The variables range from the child's own particular internal resources, to the physical and economic surroundings they live in, through to their relationships with parents, peers and others in their life. Determining which one, or combination of these variables, leads to which outcomes is not a precise task. We simply cannot know how life would have been different if a child had, or had not, relocated with a parent. (Henaghan, 2011, p. 235)

The difficulty of applying existing social science research to individual cases led this New Zealand scholar to propose the adoption of a framework for presumptive decision-making. In Chapter 5.0, we discuss the issue of whether there is value to presumptive frameworks for relocation decision-making.[7]

[1] These jurisdictions include Washington and Oklahoma. In England and Wales, a residential parent can undertake an "internal move," within the jurisdiction, unless a court finds that there are "exceptional circumstances." For international moves there is a presumption in favour of relocation by the residential parent. In *Payne v Payne,* [2001] EWCA 166, Thorpe LJ explained this presumption:

In most relocation cases, the most crucial assessment and finding for the judge is likely to be the effect of the refusal of the application on the mother's future psychological and emotional status.

More recently, in *M.K. v C.K.*, [2011] Eng. C.A. 793 the English Court of Appeal held that for international moves, if there is a "practical sharing of the burden of care" (in that case a 43/57 split), there was no presumption in favour of relocation.

[2] Alabama; see also e.g., *Stout v. Stout,* 560 NW 2d 903(ND 1997). For a review of American law, see Atkinson (2010).

[3] (1996), 19 R.F.L. (4^{th}) 177 (S.C.C.).

[4] In this report we often refer to the parent seeking relocation as the mother, while assuming that the non-moving parent is the father, and use corresponding female and male adjectives and pronouns as appropriate. This is a common, though not universal, practice in the literature. As discussed in Chapter 3.0, in Canada more than 90 percent of relocation applications are made by mothers.

[5] See e.g., *Spencer v. Spencer,* 2005 ABCA 262, 15 R.F.L. (6th) 237; *B.(R).v. B.(E.),* 2010 ABCA 229, 86 R.F.L. (6th) 266; *S.S.L. v. J.W.W.*, [2010] B.C.J. 180, 2010 BCCA 55, 81 R.F.L. (6th) 38.
[6] J. Kelly & M. Lamb (2003) cited in *Prasad v. Lee*, [2008] O.J. No. 2072 (Ont. Sup. Ct.). per J.C. Murray J.; and *C.M.S. v. M.R.J.S.*, [2009] Y.J. 53, 2009 YKSC 32, per Gower J.
[7] Prof. Henaghan proposes a framework similar to that in the 2010 British Columbia White Paper, with an important distinction drawn between cases where an application is made by a parent who takes responsibility for the care of a child more than 50 percent of time (presumption of move) and cases of "shared care" (50 percent each) where there is a presumption in favor of the status quo.

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