UNTYING THE RELOCATION KNOT: RECENT DEVELOPMENTS AND A MODEL FOR CHANGE

CHRIS FORD[*]

INTRODUCTION

Relocation jurisprudence is a critical women's law issue. Women are awarded primary custody of their children in the vast majority of divorce cases.[1] The post-divorce family unit, comprised of the custodial parent and children, typically faces decisions about whether to relocate.[2] Most of these relocation decisions stem from economic necessity or a custodial parent's remarriage.[3] A state that makes relocation difficult forces the custodial parent to make the unenviable choice of either pursuing a new opportunity in a different location, which may result in a loss of custody, or foregoing the opportunity and staying in the same locality in order to maintain custody.[4] States that make relocation easier, on the other hand, have come to respect the custodial parent's decision to move and have recognized the importance of maintaining the stable custodial relationship that has developed subsequent to the initial custody determination.[5] How a state responds to relocation through its legal apparatus thus implicates the financial and emotional well-being of the post-divorce family.[6]

---

[*]J.D., Harvard University School of Law, 1997; currently clerking for Justice Mullarkey of the Colorado Supreme Court. The author would like to acknowledge Professor Martha Field of the Harvard Law School and Veronica Sarrato, Esq. of theHarvard Legal Services Center for their invaluable feedback in the development of this paper.

[1] *See infra* Section II.

[2] *Id.*

[3] *Id.*

[4] *See e.g.*, 750 Ill. Comp. Stat. Ann. 5/609 (West 1993), as discussed in *infra* Section II.

[5] *See e.g.*, In re Marriage of Francis, 919 P.2d 776, 783 (Colo. 1996), as discussed in *infra* Section III-C.

[6] *See infra* Section II.

This paper explores the difficult issues raised when a custodial parent seeks to relocate and attempts to offer insight into a model for change.[7] Section I describes two recent relocation disputes in which the author was involved. Section II explores the reality of relocation in today's society and the competing interests of the custodial and noncustodial parent. Section III provides an overview and critique of states' differing approaches to relocation disputes, including a review of the major 1996 relocation decisions. Section IV diverges from previous reviews of relocation laws in the literature by examining specifically how the eight states following the Uniform Marriage and Divorce Act have responded to relocation. Looking through the prism of the Uniform Marriage and Divorce Act, the paper concludes that the states that most closely follow this statute are the best models for legislatures and courts seeking to reform their relocation laws.

I. RELOCATION IN CONTEXT

A. Massachusetts, Spring 1996

When Edith came to the Harvard Legal Services Center in early 1996, I was a student attorney representing primarily low-income women in local probate and family courts.[8] Edith came to the Harvard Legal Services Center seeking a divorce from her husband, Alfred, and custody of their two-year-old daughter.[9]

Like most divorcing couples, Edith and Alfred had been married less than ten years.[10] They married in 1991 and had a daughter, Glenda, in 1992. Since Glenda's birth, Edith had consistently been her primary care-taker. There was no history of physical or sexual abuse between Alfred and Edith, nor had either parent abused Glenda. Their marriage had simply failed.

---

[7]Except for arguably applicable case law, the paper does not consider relocation disputes within the context of original custody determinations awarded upon the divorce decree, nor does the paper address relocation situations where the divorced parents share physical custody of the child.

[8]The Massachusetts Supreme Judicial Court certifies students to represent clients upon completing certain prerequisites. This certification process has been part of a deliberate effort to increase legal services to low-income persons in Massachusetts. *See* MA.R.S.Ct. 3:03 (1986).

[9]The parties' names and identifying characteristics have been changed to protect client confidentiality. The factual basis of the case presented mirrors the legal problem and resolution as it occurred.

[10]*See* U.S. divorce statistics, *infra* section II.

Edith believed that Alfred would not contest Edith's request for physical custody of Glenda. Edith, however, wanted to relocate to her native Florida "as soon as possible" in order to be close to extended family living there. Apart from Alfred, she did not have any family ties to the Boston area. For Edith, gaining custody of Glenda and relocating to Florida were her most important priorities.

In our initial legal counseling sessions, I helped Edith clarify her goals in light of the governing law in Massachusetts. Fueled in part by popular misconceptions, Edith initially had unrealistically high expectations about alimony, child support, and property division.[11] To complicate matters, Massachusetts has a statute that prohibits either divorced parent from removing a child from the state without the other parent's permission or the probate court's permission "upon cause shown."[12] Yannas v. Frondistou-Yannas,[13] which was the Massachusetts Supreme Judicial Court's latest interpretation of the removal statute, required probate courts to evaluate the "best interests" of the child in a relocation case. According to the Yannas court, the appropriate factors included the possible improvement in the quality of the child's life as a result of the move; the possible adverse effect arising from the elimination or curtailment of the child's association with the noncustodial parent; the emotional, physical, or developmental impact from moving or not moving; and the noncustodial parent's interests.[14] This legal framework provided trial judges with significant discretion in granting or denying a relocation request.

In consultation with my supervising attorney, I determined that Edith faced a gamble with uncertain consequences should she have to litigate the relocation issue. Though Edith might eventually receive court permission, Alfred could certainly contest the proposed move. Edith had in her favor the fact that Glenda would have access to extended family in Florida. Glenda

---

[11]Because Edith and Alfred's marriage was considered short-term (*i.e.*, under seven years) and Edith had a professional executive assistant job, a probate court would almost certainly not enter an alimony order. *See* Mass. Gen. Laws Ann. ch. 208, § 34 (West 1986 & Cum. Supp. 1996). Property that Alfred owned prior to the marriage was completely encumbered and hence not useful to Edith. Alfred's child support responsibilities were governed by statute. *See* Mass. Gen. Laws Ann. ch. 209, § 32 (West 1986 & Cum. Supp. 1996). Under this statute, a court would consider Alfred's support obligations to the children from his first marriage before considering his obligations to Glenda. *See id.*

[12]Mass. Gen. Laws Ann. ch. 208, § 30 (West 1987).

[13]481 N.E.2d 1153, 1157-58 (Mass. 1985).

[14]*Id.* at 1158.

would also benefit from Edith's improved sense of well-being.[15] Working against Edith, however, was the significant curtailment in visitation between Alfred and Glenda that would result from the move.[16] Rather than enjoying weekly contact with Glenda, Alfred would be able to see Glenda only by traveling to Florida and/or by bringing Glenda and Edith back to Boston for extended visits.[17] Although Alfred had a well-paying job, he also had significant debt and could argue that the costs associated with such a visitation arrangement would dramatically reduce the amount of visitation he would normally have with Glenda if she remained in Boston. Alfred's credible arguments opposing relocation meant that choosing to litigate could jeopardize Edith's attempt to move to Florida quickly.

Believing that enough commonality existed between Edith and Alfred, my supervising attorney and I suggested to Edith that she pursue negotiation with Alfred and attempt to draft terms for a joint divorce petition.[18] In Massachusetts, joint divorce petitions move significantly more quickly through the probate courts' dockets than plaintiff initiated suits and require complete agreement between the parties.[19] Therefore, a joint petition and separation agreement that provided for Edith and Glenda's relocation would mean that Alfred could not contest the relocation and Edith could resettle in Florida more expeditiously. In the end, Edith decided to negotiate the terms of the divorce and custody arrangement rather than enter the fray of litigation.

The most important downside of this strategy was Alfred's potential use of the relocation issue to force concessions that Edith might not otherwise make. For example, we planned to ask Alfred to provide support for both Edith and Glenda, as well as to agree to finance Glenda's long-term

---

[15]*See* Hale v. Hale, 429 N.E.2d 340, 342 (Mass. 1981) (recognizing that the best interests of the child are interwoven with the well-being of the custodial parent and that a trial court, therefore, must also consider the positive impact of the relocation on the custodial parent).

[16]*See* Yannas, 481 N.E.2d at 1158.

[17]Because Glenda was only four years old, she would have to travel with Edith to Boston for at least the next several years.

[18]*See* Mass. Gen. Laws Ann. ch. 208, § 1A (West 1987) (joint petition divorce requires a joint petition signed by both parties, sworn affidavits by both parties indicating that an irretrievable breakdown in the marriage occurred, and a notarized separation agreement signed by both parties).

[19]*Cf.* Mass. Gen. Laws Ann. ch. 208 § 1A (West 1987) (no waiting period) *with* Mass. Gen. L. ch. 208, § 1B (divorce sought by one party on irretrievable breakdown grounds requires six month waiting period between the filing of the complaint and the final hearing date).

education.[20] By wielding his power to withhold consent for the relocation, Alfred could attempt to reduce Edith's requests. This potential wedge issue forced Edith to consider at what point her desire to relocate as soon as possible should give way to these other goals.

Although our negotiations with Alfred were successful,[21] we had to negotiate under the shadow of the relocation state statute and case-law, which gave the trial court wide discretion to grant or deny Edith's relocation request. The unpredictability in outcome put Edith in a weakened negotiation position, raising the possibility she might be forced to forego financial assistance and/or other favorable terms in order to move. Given the inevitable decline in living standard that lay ahead, Edith and Glenda needed as favorable an agreement as possible.[22] The law, unfortunately, put them at risk for not realizing that security.

B. Colorado, Summer 1996

As a summer clerk in a Colorado law firm, I found my position as advocate on the relocation ledger suddenly altered. Michael sought legal representation in a divorce from his wife, Jan.[23] The couple had been married over ten years and had two children. Jan had been the primary caretaker of the children and retained custody of them after she and Michael separated.

After the divorce, Jan planned to move to the East coast with the children to pursue an employment opportunity. Although Michael did not want to oppose Jan's request for physical custody of the children, he did not want them to move so far away. Since their separation, Michael had maintained regular contact with the children and remained active in their daily lives. Michael feared that the proposed move would alter his relationship with them.

---

[20]As noted in *supra* note 11, Alfred would at a minimum have to comply with the statutory child support guidelines.

[21]Alfred agreed to consent to Edith's and Glenda's relocation to Florida, to provide child support in excess of the child support guidelines, and to pay for Glenda's private education.

[22]Edith had not secured a job in Florida. Furthermore, she would no longer have Alfred's salary contributing to the family budget, beyond what he would pay in child support.

[23]The parties' names and identifying characters have been changed to protect client confidentiality. The factual basis of the case presented mirrors the legal problem and resolution as it occurred.

The lawyer with whom I worked advised Michael that he could challenge the proposed relocation.[24] Although the chances of prohibiting the relocation were uncertain, Michael was leaning toward litigating the relocation issue. At the beginning of the summer, however, the Colorado Supreme Court rendered the In re Marriage of Francis[25] decision, which pronounced a new relocation standard. The Francis court declared that a strong presumption favored relocation when one parent had sole physical custody. Unless Michael wanted to counter-claim for joint physical custody, a court would most likely allow Jan's relocation under the Francis standard. In the end, Michael chose not to pursue joint physical custody and Jan relocated with the children.

II. DIVORCE AND RELOCATION IN THE U.S.: COMPETING INTERESTS AND THE IMPACT ON CHILDREN

The cases of Glenda and Michael and the ripple effects caused by their divorces certainly are not unique. In 1994, approximately 2,362,000 couples were married and 1,191,000 couples divorced.[26] The median marriage duration for divorcing couples is approximately 7.2 years.[27] Post-divorce, women become the primary custodian in the overwhelming majority of cases.[28] The mother is awarded physical custody of the children in approximately 72 percent of custody cases, while both parents are awarded physical custody in 16 percent of custody cases and the father is awarded physical custody in nine percent of cases.[29]

---

[24]*See* In re Marriage of Wall, 868 P.2d 387 (Colo. 1994) (requiring court to apply best interest standard when considering a custody change).

[25]919 P.2d 776 (Colo. 1996). *See* 22 Fam. L. Rep. 1368 (BNA) (announcing in headline that "[e]ndangerment standard applies where residential custody would change[;] Colorado court also addresses 'best interest' standard in removal case, and recognizes presumption favoring custodial parent.").

[26]*See* National Center for Health Statistics, Annual Summary of Births, Marriages, and Deaths: United States, 1994.

[27]*See* National Center for Health Statistics, Advance Report of Final Divorce Statistics, 1989 and 1990.

[28]*Id.*

[29]*Id.*

The geographic mobility of the U.S. population and post-divorce demands give rise to relocation considerations for the new family unit.[30] Within four years of separation or divorce, about one-fourth of mothers with custody move to a new location.[31] The mobility of the new family unit is hardly surprising in light of the fact that one in five Americans changes his or her residence each year.[32]

Custodial parents, like all parents, have diverse reasons for wanting to relocate. The bulk of relocations are due to economic necessity or the custodial parent's remarriage.[33] Other reasons that appear in relocation cases include the custodial parent's desire to pursue education,[34] to be close to family,[35] or simply to stake out a "fresh start."[36] The In re Burgess court aptly recognized:

> Because of the ordinary needs for both parents after a marital dissolution to secure or retain employment, pursue educational or career opportunities, or reside in the same location as a new spouse or other family or friends, it is unrealistic to assume that divorced parents will permanently remain in the same location after dissolution or to exert pressure on them to do so.[37]

Such relocation decisions for the custodial parent are a natural consequence of the family management process that occurs post-divorce.[38]

The custodial parent residing in a jurisdiction that makes relocation difficult, either because the law requires her to prove that the move is

---

[30]For the duration of this paper, the custodial parent will be referred to in the feminine and the noncustodial parent in the masculine. These associations reflect the statistics discussed in *supra* notes 28 and 29, not the inherent or inevitable capacities of divorced fathers or mothers to be custodial parents.

[31]*See* Albert A. Menashe & William E. Hensley, What About the Parent Left Behind?, 11 Fam. Advoc. 16 (1989) (citing Bane & Weiss, Alone Together, 2 American Demographics 11 (1980)).

[32]*See* In re Marriage of Burgess, 913 P.2d 473, 480 (Calif. 1996).

[33]*Id.* at 480.

[34]*See* Francis, 919 P.2d at 778-79.

[35]*See* Browner v. Kenward, 665 N.E.2d 145, 147 (N.Y. 1996) (companion case to Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996)).

[36]*See* Tropea, 665 N.E.2d at 151.

[37]913 P.2d at 480-81.

[38]*See* Gene v. Aaby, 924 S.W.2d 623, 624 (Tenn. 1996) (recognizing that the decision to relocate is one of the many decisions a custodial parent must make that will affect her children).

justified,[39] or because the body of inconsistent case law makes it impossible to predict whether the relocation will be allowed,[40] faces painfully difficult decisions. Several commentators have dubbed the custodial parent's dilemma in such situations a "Sophie's choice," where the state imposed burdens force her to choose between moving for a new spouse, job, or educational opportunity and staying put, either temporarily until the relocation issue is resolved or permanently if she loses the litigation.[41] As a consequence, the custodial parent may experience mental and emotional harm, such as depression, either from the lost opportunities if she decides not to relocate or the loss of her children if she leaves.[42]

The custodial parent who decides to skirt the legal system's sanction for the move may also face civil and criminal penalties. A custodial parent who has left the jurisdiction in violation of a court order may face difficulty if she brings a subsequent support action because the noncustodial parent may have an affirmative defense related to the violation.[43] In addition, a custodial parent who is required to seek court approval for the relocation and who fails to do so may be liable for contempt.[44] Even more serious, a custodial parent who loses the relocation motion and decides to relocate with the children anyway

---

[39]*See e.g.*, 750 Ill. Comp. Stat. Ann. 5/609 (West 1993) (formerly Ill. St. Ch. 40, ¶ 609) (placing burden of proving the child's best interests on the custodial parent seeking to relocate). This statute is discussed more thoroughly in *infra* section IV-C(1)(a).

[40]*See infra* section IV-C(2)(a) discussing Missouri case-law.

[41]*See e.g.*, Carol S. Bruch & Janet Bowermaster, The Relocation of Children and Custodial Parents: Public Policy, Past and Present, 30 Fam. L. Q. 245, 248 (1996) (condemning the predicament of choosing between spouse, education, or employment and keeping custody). *Cf.* Harder v. Harder, 524 N.W.2d 325, 329 (Neb. 1994) (holding that the trial court created an impermissible choice : "As we have stated, a custodial parent will not be placed in a position of deciding between custody of a child and a different career, whether it is job-related or matrimonial"). The "Sophie's choice" analogy derives from the film Sophie's Choice, in which a mother sent to a Holocaust death camp must choose which one of her two children should enter a line that she believes will lead to imminent death. Though the analogy is between a choice of two children, it aptly serves as an illustration of the heart-wrenching choices the custodial parent must make, whether between child and spouse, child and education, child and job, or child and closeness to extended family.

[42]*See* 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, 315 (1996).

[43]*See* Diane Shiering, Removal by Custodial Parents of Child From Jurisdiction in Violation of Court Order As Justifying Termination, Suspension, or Reduction of Child Support Payments, 8 A.L.R. 4th 1231 (1981).

[44]*See* Menashe & Hensley, *supra* note 31, at 18.

could be prosecuted under the Parental Kidnaping Prevention Act.[45] Any of these consequences may keep a custodial parent from pursuing the relocation.

The mother's decision regarding relocation naturally impacts the children. When the mother decides against relocating, the child may suffer from the parent's sense of loss.[46] In such situations, a child often internalizes feelings of guilt over the custodial parent's difficulties.[47] Conversely, when the mother decides to relocate without the child, the child may experience adjustment problems related to the lost custodial relationship.[48] As a result, courts have begun to realize that a consideration of the child's "best interest" cannot be severed from the well-being of the custodial parent.[49] For example, in Taylor v. Taylor, the Tennessee Supreme Court determined that because the custodial parent must care for the child on a daily basis, the custodial parent's happiness and well-being are crucial to the child's interests and that the "child's best interests are fundamentally interrelated with those of the custodial parent."[50]

Not all custodial parents, however, are motivated solely by a desire to improve their family unit's situation. When a marriage and/or divorce has been fraught with pain and strife, the custodial parent may seek to distance herself from the noncustodial parent, or to use relocation as a means to undermine the noncustodial parent's relationship with the children.[51] Commentators have been divided over the consequence of such motives.[52] In

---

[45]*See* 18 U.S.C.A. § 1073 (1976 & Cum. Supp. 1995); 28 U.S.C.A. § 1073, 1738A (1994).

[46]*See* Wallerstein & Tanke, *supra* note 4, at 315 (explaining that the child may experience diminished parenting as a result of the custodial parent's discouragement).

[47]*Id.*

[48]*Id.* (explaining the negative impact on a child whose custodial relationship is disrupted post-divorce).

[49]*See* Russenberger v. Russenberger, 669 So.2d 1044, 1046 (Fla. 1996) (noting that a child's sense of well-being follows from a relocation that improves the parent's well-being); Taylor v. Taylor, 849 S.W.2d 319, 328 (Tenn. 1993) (same).

[50]Taylor, 849 S.W.2d at 328.

[51]*See* Russenberger, 669 So.2d at 1047 (calling into question the custodial parent's motive for relocating and her unlikely compliance with substitute visitation).

[52]Wallerstein & Tanke, *supra* note 42, at 321 recommend that "[r]elocation should be undertaken honestly, carefully, and in good faith. Reasons for a move that are frivolous or advanced out of anger or a desire for revenge that is calculated to prevent or substantially diminish a child's contact with the other parent do not justify the move." Bruch & Bowermaster, *supra* note 41, at 267-68, however, disagree. They discuss Carol S. Bruch, et al., Draft Research and Policy Bases for Relocation Cases (unpublished 1993), an inter-disciplinary report produced at the request of a California state senator that provided recommendations for reforming California's relocation law. Bruch & Bowermaster criticize as "too narrow" and

spite of a growing trend toward allowing relocations, courts, however, have almost universally frowned on moves emanating from a deliberate intention to truncate the noncustodial parent's relationship with the children.[53]

For the post-divorce child, stability and a close relationship with the custodial parent become paramount in the child's emotional, psychological, and mental development.[54] Additionally, a lessening of inter-parental conflict and the development of a cooperative parent-to-parent relationship have been associated with good outcomes for children.[55] Litigating anew the custody issue in relocation disputes injects instability into the child's new family unit, is often traumatic for children, and "has a serious potential for not only creating more suffering, but for doing lasting psychological damage to a child who has already been traumatized by the divorce..."[56]

Researchers now challenge the general connection between the child's frequent access to the noncustodial parent and the child's "best interest." Dr. Judith Wallerstein, the founder and former director of the Center for the Family in Transition in Marin County, California, has written extensively about children and divorce.[57] The California Supreme Court's In re Burgess decision closely mirrors the positions advocated by Dr. Wallerstein in an amica curiae brief filed on her behalf in that case.[58] After reviewing her own and several other longitudinal studies assessing frequency of visitation and amount of time spent between the noncustodial parent and child, Dr. Wallerstein has concluded that the cumulative body of social science research on custody does not support the presumption that frequent and continuing

---

"inappropriate" this report's inclusion of a recommendation that a custodial parent should not relocate for insubstantial reasons or with the intention of disrupting the child's relationship with the other parent. Similarly, Arthur LaFrance, Child Custody and Relocation: A Constitutional Perspective, 34 U. Louisville. J. Fam. L. 1, 7, 67 (1996) argues for a constitutionally-based standard that disallows relocation solely when a noncustodial parent demonstrates that a relocation will endanger the child. Though this paper generally supports the broadly permissive view advocated by all these commentators, the paper supports the Wallerstein & Tanke position by concluding that it is both unrealistic and improper to disregard an ill-willed relocation motive.

[53]*See* Russenberger, 669 So.2d at 1047; Gene v. Aaby, 924 S.W.2d 623, 629 (Tenn. 1996). *See also* Jeff Atkinson, Modern Child Custody Practice, § 7.08 (1986 & Cum. Supp. 1996) (noting that courts want to be assured of a good faith reason for the relocation).

[54]*See* Wallerstein & Tanke, *supra* note 42, at 311.

[55]*Id.*

[56]*Id.*

[57]*Id.* at 323 nn.2-3 (citing various publications by Dr. Wallerstein).

[58]*Id.* at 305.

access to both parents is at the core of the child's best interests.[59] Dr. Wallerstein points to other studies finding that the visitation quality, not the quantity, is the critical element in the child's development.[60]

For the noncustodial parent, relocation can mean a dramatic change in the visitation schedule. Some studies suggest that fathers prefer greater involvement with their children and desire more frequent contact with them.[61] Moreover, increased father-child contact is often associated with a father's enhanced self-esteem and sense of competency.[62] The noncustodial parent genuinely interested in visiting his children faces a "second crisis" post-divorce when the children leave the area in which he lives.[63]

The noncustodial parent's motivation in opposing the relocation, however, may be driven by forces other than a desire to continue frequent contact with the children. The noncustodial parent may use his power to hold-up the relocation via litigation in an effort to lower support costs (*i.e.*, "I'll let you go if I don't have to pay as much for you and the children.").[64] Or, his opposition may simply stem from a need to continue control over the previous family unit members.[65]

---

[59]*Id.* at 311-12 (emphasis in original).

[60]Among the studies Wallerstein & Tanke cite is Janet R. Johnston, Children's Adjustment in Sole Compared to Joint Custody Families and Principles for Custody Decision Making, 33 Fam. & Conciliation Cts. Rev. 415, 419 (1995) (concluding that more substantial access and visitation were not, by themselves, associated with better or worse outcomes in these children). *But see* Joyce A. Arditti & Timothy Z. Keith, Visitation Frequency, Child Support Payment, and the Father-Child Relationship Post-Divorce 55 J. of Marriage and Fam. 699 (1993) (finding partial support for the theory that frequent father-child contact was associated with better visitation quality).

[61]*See* Arditti & Keith, *supra* note 60, at 699.

[62]*Id.*

[63]*See* Menashe & Hensley, *supra* note 31, at 17.

[64]*See* D'Onofrio v. D'Onofrio, 365 A.2d 27, 32 (Super. Ct. Ch. Div. 1976), *aff'd* 365 A.2d 716 (N.J. Super. Ct. App. Div. 1976) (reviewing the mother's testimony showing that the father originally did not object to her proposed move from New Jersey to South Carolina if she agreed not to request weekly child support and to arrange for the children's transportation back to New Jersey for visitation). *See also* discussion of Glenda and Alfred in *supra* section I.

[65]*See* Burgess, 913 P.2d at 477 (custodial mother testified that father's objection to move only 40 miles away was motivated, at least in part, by a desire to retain control over the mother and children).

Apart from the difficult emotional and social issues, relocation disputes also raise fundamental constitutional concerns.[66] Court intervention that prevents the custodial parent from removing the child implicates her right to travel (by forcing her de facto to stay in the area in order to maintain custody), the right to remarry (by having to forego marriage to a spouse living in another locale), and possibly the right to equal protection (if women are impacted to a greater extent by relocation restrictions).[67] The noncustodial parent, however, also has a liberty interest in caring for his child and has a right to access that has constitutional protections.[68]

In its recent Tropea v. Tropea decision, New York's highest court described relocation cases as "present[ing] some of the knottiest and most disturbing problems that our courts are called upon to resolve."[69] In light of the competing interests between the custodial parent seeking to improve the family unit's lot and the noncustodial parent seeking close proximity to the children, it is not surprising that courts have tried to untie "the knot" in various ways. The next section explores the courts' resolution of relocation cases and the implications for the post-divorce family.

III. THE NATIONAL LANDSCAPE: FROM D'ONOFRIO TO THE 1996 PENDULUM SHIFT

A. D'Onofrio v. D'Onofrio

Two decades ago, the Superior Court of New Jersey, Chancery Division decided D'Onofrio v. D'Onofrio.[70] The decision has been called "perhaps the

---

[66]*See infra* section IV-B discussing the limitations of relying solely on constitutional rights as a basis for broadly permissive relocation laws.

[67]*See* John P. McCahey et al., Child Custody and Visitation Law and Practice, § 25.01[4] (1983 & Cum. Supp. 1996) (citing cases); Linda H. Elrod, Child Custody Practice and Procedure, § 17:26 (1993). *But see* Carter v. Schilb, 877 S.W.2d 665 (Mo. Ct. App. 1994) (holding that the denial of the relocation request did not violate the custodial mother's constitutional rights to marriage and family); Homer Clark, The Law of Domestic Relations in the United States § 20.4 at 517 (2d. ed. 1987) (rejecting custodial parents' right to travel and citing cases that have considered and rejected such claims).

[68]McCahey et al., *supra* note 67, at § 25.01[4].

[69]665 N.E.2d at 148.

[70]365 A.2d at 27.

leading case on custodial parent relocation."[71] Indeed, 17 states have cited the decision favorably[72] and several states have adopted the four factor analysis promulgated by the D'Onofrio court as the basis for their relocation frameworks.[73]

In D'Onofrio, the trial court granted the mother's application to remove her two children to South Carolina and to establish permanent residency there.[74] The mother sought to relocate to her native town in South Carolina so that she could be close to extended family, to realize lower costs of living, and to take advantage of a new job offering a significant salary increase.[75] In affirming the trial court's order, the D'Onofrio court recognized:

> The children, after the parents' divorce or separation, belong to a different family unit than they did when the parents lived together. The new family unit consists only of the children and the custodial parent, and what is advantageous to the unit as a whole, to each of its members individually and to the way the relate to each other and function together is obviously in the best interests of the children.[76]

The court also emphasized that an alternate visitation schedule with the father that provided for uninterrupted time throughout the year could foster a relationship with the children that was at least as beneficial, if not better.[77]

In spite of supporting the importance of the new family unit, the D'Onofrio court placed a heavy burden on the mother. To relocate, the custodial parent had to demonstrate that the move would result in "a real

---

[71]Staab v. Hurst, 868 S.W.2d 517, 519 (Ark. 1994). *See also* Ann. M. Harlambie, Handling Child Custody, Abuse, and Adoption Cases § 7.08 (1993) (opining that D'Onofrio has been one of the most influential relocation cases).

[72]*See* Shepard's Atlantic Reporter Citations (Westlaw 1996).

[73]*See, e.g.,* Constantini v. Constantini, 521 N.W.2d 1, 2 (Mich. 1995); Eda Russell-Carroll, Relocating Children of Divorce: Best Interests Test in Massachusetts and New York, 14 Mass. Fam. L .J. 1, 1-2 (1996) (tracing the origins of Massachusetts relocation case-law to D'Onofrio); David Manz & Jesse J. Bennett, Mize: Florida's Disenchanted Response to the Relocation Dilemma, 68 Fla. B.J. 53, 54 (1995) (tracing Florida's relocation law from Matilla v. Matilla, 474 So.2d 206 (Fla. Ct. App. 1985), which adopted the extensive analysis in D'Onofrio, to Mize v. Mize, 621 So.2d 417 (Fla. 1993), which adopted the Matilla framework and added considerations of transportation and the child's best interest as the sum of the four D'Onofrio factors and transportation).

[74]D'Onofrio, 365 A.2d at 28.

[75]*Id.* at 31-32.

[76]*Id.* at 29-30.

[77]*Id.* at 30.

advantage" to herself and the child.[78] In addition, D'Onofrio directed trial courts to consider whether the custodial parent was motivated to defeat visitation and whether the custodial parent would comply with substitute visitation orders; to examine the integrity of the noncustodial parent's motives in resisting the removal; and to determine whether substitute visitation could provide a basis for preserving and fostering the child's relationship with the noncustodial parent.[79] These four factors and the custodial parent's burden of proof put into place the model upon which subsequent courts throughout the country began relying in deciding relocation cases.

B. Relocation Case-Law on the Eve of 1996

Prior to the landmark cases decided in 1996,[80] courts' relocation decisions could be plotted on a spectrum characterized by a few highly restrictive jurisdictions with nearly insurmountable hurdles on one end and a few liberally permissive jurisdictions on the other end. The majority of courts fell in a middle range that provided trial courts wide discretion in fleshing out the child's "best interests."[81] Thus, whether a custodial parent could relocate often depended (and still does in spite of the 1996 changes) on the judicial and legislative rules of the state in which she resides.

Before the summer of 1996, New York had the most restrictive relocation rule in the country.[82] The New York courts required the custodial parent to show "exceptional circumstances" for the relocation whenever a move would deprive the noncustodial parent of regular and meaningful access to the child (an almost certain outcome if the move was far enough to disrupt the regular contact between the child and noncustodial parent).[83] Even when the custodial

---

[78] *Id.* at 30.

[79] *Id.* at 30.

[80] *See infra* section III-C.

[81] *See* Claudia A. Pott & Kala Shah, Relocations Pose Custody Concerns, Nat'l L. J., June 6, 1996, at B7.

[82] *See* McCahey et al., *supra* note 67, at § 25.04[3] (noting that other jurisdictions did not have the same stringent requirements as those in New York).

[83] *See* Joel R. Brandes & Carole L. Weidman, Relocation Resolved, N.Y. L.J., Apr. 23, 1996, at 3 (describing the origin of New York's three prong test, which required a New York court to ask three questions: 1) Would the proposed move effectively deprive the noncustodial parent of frequent and regular access to the child? (if not, then the relocation should be allowed); 2) If the relocation would disrupt such access, then are there exceptional circumstances allowing the relocation?; 3) If there are exceptional circumstances, is the

parent demonstrated exceptional circumstances, the court still had to find that the relocation was in the child's best interests.[84] Because this test posed a stringent barrier to relocation, many trial judges sought to evade it in their decisions.[85] Consequently, inconsistent rulings developed, which bred extensive litigation throughout the state with unpredictable results.[86]

In addition to New York, other states have created relocation barriers by imposing presumptions against such moves. For example, in McAlister v. Patterson,[87] the South Carolina Supreme Court announced that the presumption in relocation cases is against removal. The custodial parent can overcome the presumption only upon a showing that relocation will benefit the child. Likewise, under White v. White,[88] a custodial parent seeking to relocate outside Pennsylvania must demonstrate that the move will significantly improve the quality of life for the parent and child. The Illinois legislature placed on the custodial parent the burden of proving that the removal is in the best interests of the child.[89] Because the allocation of burdens of proof in relocation cases are often determinative,[90] custodial parents seeking to relocate face an up-hill battle in the handful of states requiring them to demonstrate the association between the move and their child's best interests.

In contrast to these restrictive states, a small group of states made it significantly easier for custodial parents seeking to relocate. In a string of opinions, the Minnesota Supreme Court ruled that the noncustodial parent has the burden of proving that a proposed move would either endanger the child or stems from a vindictive desire to frustrate the noncustodial parent's

---

relocation in the child's best interest?).

[84] *Id.*

[85] *See* LaFrance, *supra* note 52, at 57.

[86] *Id.*

[87] 299 S.E.2d 322, 323 (S.C. 1982).

[88] 650 A.2d 110, 113 (Pa. Super. Ct. 1994).

[89] *See* 750 Ill. Comp. Stat. Ann. 5/609 (West 1993). The Illinois provision is critiqued in *infra* section IV-C(1)(a).

[90] *See* Atkinson, *supra* note 53, at §7.02 (noting that the weight of evidence in many relocation cases will not decidedly weigh in one or the other party's favor because of the inevitable advantages (*e.g.*, a better job) and disadvantages (*e.g.*, loss of frequent contact); as a result, the allocations of burden may dictate the result).

relationship with the child.[91] The Tennessee Supreme Court in Taylor v. Taylor[92] sought to reduce increased litigation that followed its earlier Seesel v. Seesel[93] decision, which required the custodial parent to show that relocation was in the child's best interests. In Taylor, the court criticized the indeterminacy of the best interest standard as "so vague that it defies analysis, invites decision by guesswork, and evades any sort of meaningful review on appeal."[94] As a result, the Taylor court put into place a strong presumption in favor of continuing custody.[95]

The majority of courts fall in the middle of the spectrum. In most states, the objecting noncustodial parent carries the burden of showing that the move is not in the child's best interests.[96] Indicative of this push to the middle, some courts began to see the D'Onofrio standard as too difficult for the custodial parent, emphasizing instead a determination based explicitly on the child's best interests.[97] Even New Jersey lightened the custodial parent's burden. The Holder v. Polanski [98] decision required only that the custodial parent demonstrate a sincere, good-faith reason for moving outside New Jersey. Upon such a showing, the burden shifts to the noncustodial parent to prove that the proposed relocation will affect visitation in a manner inconsistent with the child's best interest.[99] In spite of placing the burden of proof upon the noncustodial parent, states following the best interest standard endow the trial court with significant discretion in accepting or rejecting proposed relocations.

---

[91]*See* Auge v. Auge, 334 N.W.2d 393, 397 (Minn. 1983) (creating a presumption that removal would be permitted); Sefkow v. Sefkow, 427 N.W.2d 203, 214 (Minn. 1988) (announcing the endangerment standard). The Minnesota approach is discussed with approval in *infra* section IV-C(2).

[92]849 S.W.2d 319 (Tenn. 1993).

[93]748 S.W.2d 422 (Tenn. 1988).

[94]*Id.* at 326.

[95]*Id.* at 322. This paper covers Taylor more thoroughly in *infra* section III-C.

[96]*See* Atkinson, *supra* note 53, at §7.02; Pott & Shah, *supra* note 81, at B7.

[97]*See e.g.*, McQuade v. McQuade, 901 P.2d 421, 423-24 (Alaska 1995). See also James Grayson, International Relocation, the Right to Travel, and the Hague Convention, 28 Fam. L. Q. 531, 534 (1994) (observing the trend in state courts toward a presumption in favor of removal).

[98]Holder v. Polanski, 544 A.2d 852, 856-57 (N.J. 1988).

[99]*Id.*

Several commentators have criticized the open-ended best interest test followed in the middle range of the relocation spectrum.[100] The lack of standards under the best interest test and the panoply of diverse opinions created thereby result in a legal regime that is too indeterminate and, consequently, deprives lawyers and their clients of reasonably predictable outcomes.[101] Moreover, the trial court may improperly impose its own judicial bias into the decision-making process of the new family unit.[102] Though placement of the burden on the noncustodial parent lowered the bar overall, the best interest test still allows individual trial courts to raise it as they see fit.

C. 1996 Landmark Cases—A Change in the Relocation Spectrum

The pendulum of relocation case law made a dramatic move toward the permissive end in 1996. As discussed more thoroughly in this section, the New York Court of Appeals replaced the "exceptional circumstance" test with a general best interest test;[103] the California Supreme Court rejected the development of the appellate courts' "necessity" test and adopted a strong presumption in favor of relocating;[104] the Colorado Supreme Court added itself to the growing number of courts basing relocation decisions on an endangerment standard;[105] and the Tennessee Supreme Court strengthened the state's already permissive relocation rule.[106] The ordering of these four cases is deliberate: each subsequent case represents a more permissive view toward relocation. In spite of exhibiting different approaches, each state made a step toward liberalizing its relocation rules, and with close to one-fourth of the U.S. population living in these four states,[107] these decisions will have

---

[100]*See* LaFrance, *supra* note 52, at 41-43; Katherine C. Sheehan, Note, Post-Divorce Child Custody and Family Relocation, 9 Harv. Women's L. J. 135, 138 (1986) (citing additional commentators criticizing the best interest calculus).

[101]*See* LaFrance, *supra* note 52, at 41-43 (citing DeBeaumont v. Goodrich, 644 A.2d 843, 857-58 (Vt. 1994) (J. Johnson, dissenting).

[102]*Cf.* Burgess, 913 P.2d at 480-81 (criticizing a standard which requires trial courts to "micro-manage" family decisions in relocation cases by second-guessing a custodial parent's everyday career and family decisions).

[103]*See* Tropea, 665 N.E.2d at 150-52.

[104]*See* Burgess, 913 P.2d at 478, 481-82.

[105]*See* Francis, 919 P.2d at 783.

[106]*See* Gene, 924 S.W.2d at 629-30.

[107]*See* U.S. Census Bureau, Estimated 1995 Population Figures.

important ramifications for a sizable group of divorced American parents and their children.

1. New York

In Tropea v. Tropea,[108] New York's highest court revisited the relocation standard for the first time since its Weiss v. Weiss[109] decision, which it rendered in 1981. The Tropea court criticized the lower courts' tripartite exceptional circumstances test that sprang out of Weiss for raising "artificial barriers to the court's consideration of all of the relevant factors."[110] Under Weiss and prior to Tropea, any trial court finding that a relocation was unsubstantiated by exceptional circumstances and would deprive the noncustodial parent of meaningful access to the child had to deny the relocation request without considering the child's best interests.[111]

The Tropea court aligned itself with those courts that take an open look at the child's best interests regarding the proposed move. The court held that "each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child."[112] Among the factors a trial court should consider are the degree to which the move will enhance the custodial parent's and child's life economically, emotionally, and educationally; the parents' reasons for seeking and opposing the move; the impact of the move on the quantity and quality of the child's contact with the noncustodial parent; and the development of a substitute visitation schedule that will provide a meaningful parent-child relationship.[113] Though the court did not make burdens of proof explicit, the opinion implies that the burden actually falls on the custodial parent, as indicated by the statement that "[i]n the end, it is for the court to determine, based on all the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests."[114]

---

[108]665 N.E.2d at 150-153.

[109]*See* Weiss v. Weiss, 418 N.E.2d 377 (N.Y. 1981).

[110]Tropea, 665 N.E.2d at 149-50.

[111]*Id.*

[112]*Id.* at 150.

[113]*Id.* at 151.

[114]*Id.* at 151-152 (emphasis added).

Although the Tropea decision significantly eases the custodial parent's burden, the opinion suffers from many of the same flaws it identifies in the exceptional circumstances test. The court criticizes the previous regime for being "difficult to apply" and for the lower courts' resulting lack of uniformity and reliability in relocation cases.[115] As discussed previously, the open-ended best interest analysis engaged in by other courts has created the same difficulties.[116] Moreover, this new test is likely to fuel litigation over relocation.[117] Because the focus of such litigation will be on a best interest test that directs courts "to consider and give appropriate weight to all of the factors that may be relevant to the determination,"[118] relocation litigation will reopen the judicial inquiry into every facet of the parents' lives, de-stabilizing the new family unit and fostering acrimony between the parents.[119] While Tropea loosens the chain to the state, it does so at a cost—unpredictability and another round of custody battling.

2. *California*

Like the decision in Tropea, the California Supreme Court in In re Marriage of Burgess[120] tossed out a more rigid test developed by the lower courts. In reversing the trial court's order permitting the custodial mother to relocate to another California town 40 miles away, the court of appeals applied a "reasonably necessary" standard.[121] Even though the custodial mother had accepted a career-advancing job transfer in the new town and believed that the children would have greater access to medical care, extracurricular activities, private schools, and day care as a result of the move,

---

[115]*Id.* at 149.

[116]*See supra* Section III-B.

[117]*See* Leonard G. Florescu, The New View of Relocation of the Custodial Parent, N.Y. L.J., May 13, 1996, at 3 (predicting that Tropea will require a custody hearing in almost every relocation case and that the parent with more resources may be able to achieve his or her desired outcome through protracted litigation).

[118]Tropea, 665 N.E.2d at 151.

[119]*See* Barbara E. Handschu, Revolution in Relocation Law, N.Y. L.J., May 17, 1996, at 1 (predicting that lower courts will engage in full-scale, open-ended custody determinations in which parents are likely to dredge up negative aspects about the other's parenting).

[120]913 P.2d at 476.

[121]*Id.* at 477-78.

the court of appeals determined that she had not made the requisite showing of necessity.[122]

The California Supreme Court found that the necessity test contravened the legislative policy recognizing the custodial parent's presumptive right to change the residence of the minor child.[123] Further, the court disagreed with the father's assertion that the statutory framework favoring frequent and continuous contact required placing such a heavy burden on the custodial parent.[124] In summarizing its criticism of the necessity test, the court stated:

> More fundamentally, the 'necessity' of relocating frequently has little, if any, substantive bearing on the suitability of a parent to retain the role of a custodial parent. A parent who has been the primary caretaker for minor children is ordinarily no less capable of maintaining the responsibilities and obligations of parenting simply by virtue of a reasonable decision to change his or her geographical location.[125]

As a replacement for the necessity test, the Burgess court directed trial courts to take into account the custodial parent's presumptive right to move.[126]

Although Burgess involved an initial custody determination based on California's law requiring a best interest analysis, the court announced that the custodial parent's right to change residences exists both in an initial custody determination and a post-decree motion to relocate with the child.[127] The Burgess court instructed that in an initial custody determination, a trial court now must consider as part of its best interest analysis the custodial party's

---

[122]*Id.* The court of appeals placed the initial burden on the noncustodial parent to show that the move would impact significantly the existing pattern of care and adversely affect the nature and quality of the noncustodial parent's contact with the child. As applied, this standard was a low one. In this case, the father was only an hour away from the children and even he conceded that the distance was an easy commute. *Id.* at 479. The trial court had concluded that he would still be able to visit the children regularly and often. *Id.* at 479. Nevertheless, the court of appeals determined that the father met his burden. Once the noncustodial parent demonstrated the significant impact, the court of appeals' rule required the mother to show that the move was reasonably necessary.

[123]*Id.* at 480.

[124]*Id.* California Family Code section 7501 and the decisions interpreting it established a presumptive right of the custodial parent to change the residence of the minor child. California Family Code section 3020 declared a policy of continuing and frequent contact with both parents after marriage.

[125]*Id.* at 481.

[126]*Id.* at 478, 482.

[127]*Id.* at 478, 482.

presumptive right to change residences, so long as removal would not be prejudicial to the child's welfare.[128] As part of the initial custody determination, the Burgess court explained that "a trial court may consider the extent to which the minor children's contact with the noncustodial parent will be impaired by relocating."[129] When a parent who has sole physical custody under a prior judicial decree seeks to relocate, the noncustodial parent must show that a change in custody is "essential or expedient" for the child's welfare.[130] That is, the result of the relocation must cause a detriment to the child making it essential or expedient to give custody to the noncustodial parent, which is a higher showing than that required in an initial determination.[131]

Even though Burgess makes significant strides toward providing the custodial parent greater freedom to relocate with her children, the opinion suffers from ambiguity in its conclusion. The court states:

> At the same time, we recognize that bright line rules in this area are inappropriate: each case must be evaluated on its own unique facts. Although the interests of a minor child in the continuity and permanency of custodial placement with the primary caretaker will most often prevail, the trial court, in assessing 'prejudice' to the child's welfare as a result of relocating even a distance of 40 or 50 miles, may take into consideration the nature of the child's existing contact with both parents—including de facto as well as de jure custody arrangements—and the child's age, community ties, and health and educational needs.[132]

After carefully delineating the differences between initial custody determinations (*i.e.*, a best interest analysis that views relocation from a prejudice prism) and those occurring post-decree (*i.e.*, a determination that relocation should be allowed absent a showing that changing custody is essential or expedient), the court appears to throw the two together by discussing the prejudice standard within the context of de jure custody (*i.e.*, de jure custody meaning custody that has already been determined judicially). This confusing end to the opinion may give courts more room to deny post-

---

[128] *Id.* at 478.

[129] *Id.* at 481.

[130] *Id.* at 482-83.

[131] *Id.* at 482-83.

[132] *Id.* at 483 (emphasis added).

decree relocation motions which involve greater distances than the move in Burgess.[133]

3. Colorado

In In re Marriage of Francis,[134] the Colorado Supreme Court overturned a classic example of a judicially imposed "Sophie's choice." The mother and father signed a separation agreement that provided the mother with physical custody of their five minor children.[135] The separation agreement contained a clause stating that it was in the children's best interests to remain in the area in which the family resided.[136] In spite of this clause, the separation agreement acknowledged that the mother would pursue a physician's assistant's degree and that the father would pay maintenance for her to do so.[137] Although she applied to several physician's assistant's programs, she was only accepted into a program located in New York.[138] Upon learning of the mother's intent to enroll in the New York program, the father filed a motion to modify custody based on the mother's planned relocation.[139] The trial court ruled that the mother could maintain custody so long as she remained in the area.[140] The trial court's ruling meant that if she enrolled in the New York program, she would lose custody of her children. The choice was hers—either her children or her education.

---

[133]*See* Michael Moline, When a Parent Moves Away, What About the Kids?, (Nolo Press, 1996) (quoting Roderic Duncan, a retired judge from Oakland, California who teaches new judges about family law, who stated, "Burgess was really too easy. The tough cases...are when somebody moves more than 1,000 miles away. In those cases, if you allow the move-away you really substantially cripple the relationship with the parent who gets left behind."). Though neither Moline nor the commentators he quotes point out this confusing end to the Burgess opinion, their skepticism about more dramatic relocations may materialize in trial courts that find a way to use this ending to deny the relocation.

[134]919 P.2d at 776. Colorado is one of several states that enacted the Uniform Marriage and Divorce Act. This paper addresses the Uniform Marriage and Divorce Act and states enacting it in *infra* section IV. A more thorough critique of Francis is reserved for that section.

[135]*Id.* at 778.

[136]*Id.*

[137]*Id.* at 779, n.2.

[138]*Id.* at 778-79.

[139]*Id.* at 779.

[140]*Id.*

In reversing, the Colorado Supreme Court held that an endangerment standard applied to relocation motions.[141] The court recognized that the child's interests are so interwoven with those of the new family unit that a court must take into account the custodial parent's interests. In summarizing its findings, the court stated:

> In sum, we find that the child's best interests are served by preserving the custodial relationship, by avoiding re-litigation of custody decisions, and by recognizing the close link between the best interests of the custodial parent and the best interests of the child. In a removal dispute, this leads logically to a presumption that the custodial parent's choice to move with the children should generally be allowed.[142]

Though the opinion contains some inconsistencies between its holding and the noncustodial parent's required showing to alter custody,[143] the Francis court nevertheless reduced many of the ambiguities associated with the previous best interest standard.

4. Tennessee

In Gene v. Aaby,[144] the Tennessee Supreme Court sought to clarify its previous relocation-friendly Taylor v. Taylor[145] opinion and thereby took the most permissive view of these four state supreme courts. The mother in Gene had custody of their three-year-old child and sought to relocate to Kentucky with her new husband. Her new husband had family in the area, and the mother also indicated that she had found suitable employment there.[146] The father argued that the move was not in the child's best interests.[147]

The trial court's orders over the next two years regarding the proposed relocation followed conflicting opinions of the Tennessee appellate courts. Prior to Taylor, the mother had the burden of showing that the relocation was in the child's best interests.[148] The trial court found that the mother in Gene

---

[141] *Id.* at 783.

[142] *Id.* at 784.

[143] *See infra* section IV.

[144] 924 S.W.2d at 623.

[145] 849 S.W.2d 319 (Tenn. 1993).

[146] 924 S.W.2d at 624.

[147] *Id.*

[148] *Id.* at 625-26 (citing Seessel v. Seessel, 748 S.W.2d 422 (Tenn. 1988)).

had not met her burden.[149] Taylor, however, established a presumption in favor of continued custody and listed several factors that a court should consider in relocation cases.[150] Relying on Taylor, the trial court then allowed the mother to relocate.[151] Subsequently, the father in Gene successfully moved to amend the trial court's order, pointing to an unpublished Tennessee court of appeals opinion issued after Taylor.[152] Based on this opinion, the trial court found, again, that the mother in Gene had not proven that the move was in the child's best interests.[153] The Tennessee Supreme Court set out to clarify the obvious confusion and to put the mother's relocation request to rest.[154]

The Gene court discerned two major policies driving the Taylor decision.[155] First, courts should limit judicial intervention in post-divorce family decision-making.[156] Second, if relocation disputes must be litigated, they should be predictable and easier to resolve.[157] Unfortunately, as the facts in Gene demonstrated, lower court decisions under Taylor did not effectuate these two polices.

Keeping an eye toward these goals, the Gene court clarified that the noncustodial parent can successfully oppose the move by two limited showings only.[158] First, if he can demonstrate by a preponderance of the evidence that the custodial parent's relocation derives from a motive to defeat

---

[149] *Id.* at 624.

[150] *Id.* at 626-28. The factors included the following: a recognition that in a removal case, custody is not subject to de novo review unless the petition cited reasons other than removal as grounds for custody; a strong presumption in favor of continuity of the original custody award; a recognition that the welfare of the child is affected by that of the custodial parent; a review of the child's best interests to determine the advantages of the move; the possibility of rescheduling the noncustodial parent's visitation; a recognition that courts must be sensitive to the non-custodial parent's efforts to maintain his or her relationship with the children and that visitation should be adjusted accordingly; and a determination that the motives of the custodial parent are not intended to defeat or deter visitation.

[151] *Id.* at 624.

[152] *Id.* at 625.

[153] *Id.*

[154] *Id.*

[155] *Id.* at 629.

[156] *Id.*

[157] *Id.*

[158] *Id.* at 629-30.

or deter his visitation rights, then the relocation will not be allowed.[159] Alternately, he can halt the relocation by showing that the removal could pose a specific, serious threat of harm to the child.[160] On this latter showing, the Gene court explained:

> The petition would state, in effect, that the proposed move evidences such bad judgment and is so potentially harmful to the child that custody should be changed to the petitioner...However, expert psychological and/or psychiatric testimony that removal could be generally detrimental to the child will usually not suffice to establish an injury that is specific and serious enough to justify a change of custody. A move in any child's life, whether he or she is raised in the context of a one or two parent home, carries with it the potential of disruption; such common phenomena—both the fact of moving and the accompanying distress—cannot constitute a basis for the drastic measure of a change of custody.[161]

This test, prohibiting relocation for vindictive motives or a serious threat only, should reduce the increased litigation associated with reopening the best interest inquiry, eradicate the uncertainty resulting from divergent case decisions, and lessen the difficulty in appellate review—all problems that the Taylor court originally identified.[162] Moreover, the opinion supports the Taylor court's recognition that children need stability and continuity in the custodial relationship post-divorce.[163]

Although the relocation shift from D'Onofrio to the present has not been uniform, the 1996 decisions emphasize common themes. First, these courts are concerned with decreasing the confusion left by the wake of their earlier, more stringent tests. The Tropea court, for example, examined lower courts' opinions and found inconsistency stemming from the exceptional circumstance test.[164] Likewise, the Gene court concluded that even its more permissive Taylor decision, which provided courts with wide discretion, did not resolve the lack of uniformity it criticized.[165] Second, these courts made it easier for custodial parents to decide whether the family needs to move.

---

[159]*Id.* at 629.

[160]*Id.* at 629-30.

[161]*Id.* at 630.

[162]Taylor, 849 S.W.2d at 326.

[163]*Id.* at 328.

[164]Tropea, 665 N.E.2d 145 at 149.

[165]924 S.W.2d at 629.

The Burgess court, for example, recognized as inappropriate the lower courts' second-guessing of custodial parents' decisions.[166] The Francis court brought to the fore the reality that just as families with non-divorced parents must move as part of the family management process, so too will new family units post-divorce.[167] The next section turns to a possible reform model with these goals in mind: uniformity and ease of relocation. In addition, the next section examines considerations of stability for children and when judicially imposed prohibitions are necessary to protect children and to block relocation motions pursued or opposed by ill-willed motives.

IV. GUIDANCE FROM THE UNIFORM MARRIAGE AND DIVORCE ACT

As discussed in the previous section, several commentators and courts have criticized the results among states that restrict relocation by requiring the custodial parent to prove that a move is justified and among states that engage anew in best interests assessments. This section turns to a new line of inquiry: an analysis of the Uniform Marriage and Divorce Act ("the UMDA") and how states have implemented it as a guide for possible reform. It concludes by arguing that the states that most closely follow the UMDA and add a motivation component reflect the best relocation policy.

A. The UMDA

Recognizing the disparity between states in marriage, divorce, and custody laws, the National Conference of Commissioners on Uniforms State Laws developed the UMDA in 1970 as a way to foster uniformity.[168] Since its development, eight states have adopted the UMDA in some form.[169] The UMDA has separate provisions for determining custody as an original matter and for modifying custody upon a showing of changed circumstances.[170]

---

[166]913 P.2d at 481.

[167]919 P.2d at 784.

[168]*See* Unif. Marriage and Divorce Act, § 10, 9A U.L.A. 147 prefatory note (1987).

[169]*Id.* (listing Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington and the respective dates of enactment).

[170]*See* Unif. Marriage and Divorce Act § 402, 9A U.L.A. 561 (original custody); Unif. Marriage and Divorce Act, § 409, 9A U.L.A. 628 (modification).

Section 402 of the UMDA addresses custody determinations as an original matter in a divorce proceeding. Under this section, a trial court determines custody in accordance with the child's best interests.[171] Enumerated factors include the parents' wishes as to the child's custody; the child's wishes as to which parent the child prefers to have custody; the interaction and interrelationship of the child with the parents, siblings, and others who may significantly impact the child's best interest; the child's adjustment to home, school, and community; and the mental and physical health of all individuals involved.[172] In enacting this provision, the National Conference of Commissioners drew upon the factors that appellate courts most commonly applied in custody disputes and explicitly excluded "fault" based determinations (*e.g.*, sexual misconduct).[173]

While UMDA section 409, which outlines the factors for custody modification, mentions the child's best interests, the modification determination is significantly more limited than the best interest analysis in section 402. Section 409 flatly prohibits a motion for modification made earlier than two years after the custody decree date, unless the child's present environment endangers his or her physical, mental, moral, or emotional health.[174] In order to modify a custody decree after two years, a trial court must find that a change has occurred in the circumstances of the child or custodian and that the modification is necessary to serve the best interests of the child. In applying this section, however, the court must retain the original custodian unless: (1) the custodian agrees to the modification ("agreement"); (2) the child has integrated into the petitioner's family with the consent of the custodial parent ("integration"); or (3) the child's present environment seriously endangers his physical, mental, moral, or emotional health, and the advantages associated with changing custody outweigh the harm caused by such a change ("endangerment").[175] Thus, absent either the custodial parent's consent or integration into the noncustodial parent's family, the best interest analysis in section 409 turns on endangerment to the child.

The Commissioners sought to achieve several goals in heightening the modification standard. First and foremost, the section strives to achieve finality in the divorce decree, as finality has been shown to be important to

---

[171]Unif. Marriage and Divorce Act § 402, 9A U.L.A. 561.

[172]Unif. Marriage and Divorce Act § 402(1)-(5), 9A U.L.A. 561.

[173]Unif. Marriage and Divorce Act § 402 cmnt., 9A U.L.A. 561.

[174]Unif. Marriage and Divorce Act § 409(a), 9A U.L.A. 628.

[175]Unif. Marriage and Divorce Act § 409(b), 9A U.L.A. 628 (emphasis added).

children's adjustment post-divorce.[176] Thus, the noncustodial parent cannot seek to upset the original custody arrangement absent a showing of the endangerment "safety valve." Second, the statute makes it more difficult for the noncustodial parent who "tries to punish a former spouse by frequent motions to modify."[177] Third, the Commissioners sought to recognize the reality that a change in the child's environment may have an adverse effect, but that such an effect shouldn't necessarily upset the custodial arrangement. They note:

> [The statute] does authorize modifications which serve the child's 'best interest;' but this standard is to be applied under the principle that modification should be made only in three situations: [consent, integration, and endangerment]...Any change in the child's environment may have an adverse effect, even if the noncustodial parent would better serve the child's interest. Subsection (b)(3) [endangerment] focuses the issue clearly and demands the presentation of evidence relevant to the resolution of that issue.[178]

Accordingly, the "best interest" assessment upon modification is to be a narrow one, not the type of open-ended inquiry conducted under section 402.

B. Section 409 As a Model for Relocation Cases

Multiple reasons lead to the conclusion that section 409 serves as a preferable model within the relocation context. Research since the UMDA's development continues to show the importance of finality for children.[179] The endangerment standard injects far greater predictability into judicial decision-making than does a fluid, multi-factor best interest test;[180] consequently, it allows lawyers to advise their clients with more clarity, and enables clients to plan accordingly. Section 409 also respects the new family unit and the custodial parent's capacity to make decisions about relocation.[181] Moreover,

---

[176]Unif. Marriage and Divorce Act § 409 cmnt, 9A U.L.A. 629.

[177]*Id.*

[178]*Id.*

[179]As discussed in *supra* section II, children who must once again undergo judicial scrutiny in relocation cases often find the experience traumatic. *See supra* note 56.

[180]*Cf.* Gene, 924 S.W.2d at 629 (criticizing the indeterminacy of the best-interest test and replacing it with a threat of harm standard).

[181]*Cf.* Burgess, 913 P.2d at 481 (criticizing necessity test for requiring trial courts "to 'micro-manage' family decision making by second-guessing reasons for everyday decisions about career and family.").

the higher endangerment standard avoids placing a custodial parent in a no-win "Sophie's choice" situation where she is forced to sacrifice either a life-enhancing move or custody of her children.

Arthur LaFrance, Professor of Law at the Northwestern School of Law, Lewis and Clark College, also endorsed the endangerment standard in his article, Child Custody and Relocation: A Constitutional Perspective.[182] The source of his suggested standard, however, derives from an argument based solely on the custodial parent's constitutional rights, including rights to travel, to marry, to be secure in privacy, to associate, and to enjoy equal protection of the laws.[183] According to Professor LaFrance, the state's only possible compelling interest which would justify an infringement upon these constitutional rights is an interest in protecting the child from endangerment.[184] Professor LaFrance summarizes:

> Constitutional considerations...compel the conclusion that deference is due the choices of a custodial mother and that only one finding should prevent a custodial mother from relocating: a finding by clear and convincing evidence the new home would endanger the children's safety.[185]

Absent such a showing, according to Professor LaFrance, the state should not prevent the relocation.

There are several problems with basing the endangerment standard solely on constitutional rights. First, several courts and commentators have considered and simply rejected these arguments.[186] Second, even accepting *arguendo* that the relocation prohibition interferes with these rights, a state could reasonably argue that its compelling interests extend beyond that of children's safety. For example, a state could assert a compelling interest in ensuring that the noncustodial parent does not have diminished access to his children as a result of a custodial parent's vindictive relocation. Or, a state could argue that it has a compelling interest in preventing a relocation that in reality would eliminate entirely the noncustodial parent's access to his children. Additionally, noncustodial parents also have constitutionally

---

[182]*See* LaFrance, *supra* note 52, at 7, 67.

[183]*Id.* at 67.

[184]*Id.*

[185]*Id.*

[186]*See supra* note 67.

protected access rights to their children.[187] Looking exclusively to the custodial parent's rights ignores this side of the constitutional ledger. Thus, grounding the endangerment standard exclusively in constitutional argument raises the risk that states will not accept it.

Though Professor LaFrance makes a powerful criticism of the best interest standard and the need to protect the constitutional freedoms of the custodial parent post-divorce, similar, but not the same results could be achieved by using the UMDA model. In spite of Professor LaFrance's disregard for the best interest overlay in the UMDA modification scheme,[188] the endangerment standard embodied therein would go far in protecting the custodial parent's constitutional interests.

The results of implementing the UMDA as originally intended, as shall be seen in *infra* section IV-C, are similar to those advocated by Professor LaFrance. Specifically, the UMDA also applies the endangerment standard in modification cases, though it does so under the rubric of the child's best interests. In the end, legislatures and courts applying the UMDA in the spirit it was intended strongly support the custodial parent's rights to relocate.

The results are somewhat different from Professor LaFrance's strict constitutional model in that the UMDA defines endangerment more comprehensively. Professor LaFrance limits endangerment to "safety," implying a risk to the child in a physical sense (*e.g.*, safety from abuse).[189] Section 409 broadens endangerment beyond the physical to include threats to the child's mental, moral, or emotional health.[190] This broader definition seems appropriate. For example, a relocation that in reality prevents or so severely limits the child's access to a noncustodial parent with whom the child shares a strong relationship would arguably endanger that child's emotional health.[191]

---

[187]*See supra* note 68. Professor LaFrance briefly acknowledges the noncustodial parent's right to parentage but does not then address the seeming conflict resulting from a relocation that would completely preclude a father's access to the children. *See* LaFrance, *supra* note 52, at 19.

[188]*See* LaFrance, *supra* note 52, at 46-49. Professor LaFrance discusses the UMDA as a useful limitation on the open-ended best-interest test. Professor LaFrance mentions, but does not elaborate on the UMDA's endangerment requirement as a restriction to the section 409 best interest analysis. Instead, he concludes that any best interest test cannot serve as a rationale for limiting the custodial parent's rights.

[189]LaFrance, *supra* note 52, at 67.

[190]Unif. Marriage and Divorce Act § 409(b)(3), 9A U.L.A. 628.

[191]*Cf.* Wallerstein & Tanke, *supra* note 42, at 319 (discussing the need to protect a child when the child's most important relationship is with the noncustodial parent).

Professor LaFrance's model also eliminates from consideration the custodial parent's motives. As noted in *supra* section II, courts will almost uniformly deny a relocation born out of a desire to cut off the noncustodial parent's visitation rights. The courts appropriately bar such relocations as a matter of policy. Professor LaFrance's argument is discordant with the stance of almost all state courts in this regard and could likewise be rejected on this ground.

C. Comparing UMDA States

In analyzing the states which have adopted the UMDA, a bifurcated pattern emerges. On one side are those states that have adhered most closely to the original version of section 409 and have imposed the least burden on the custodial parent seeking to relocate. These states include Colorado, Kentucky, Washington, and Minnesota. By contrast, Illinois, Missouri, Arizona, and Montana have strayed from the original UMDA by imposing higher burdens for the relocating custodial parent. Consequently, these four states fall into the trap of promulgating unpredictability and bias into the decision-making process. The analysis of these two sub-groups supports the conclusion that the former group of states (Minnesota is the best example) serve as models for states seeking to reform relocation laws.

1. States Deviating from the UMDA

a. Illinois

By statute, Illinois has diverged most significantly from the UMDA. Illinois specifically links relocation to the more open best interest standard.[192] The burden of proving the child's best interests rests squarely on the shoulders of the party seeking relocation (*i.e.*, the custodial parent).[193] The statute deviates from the UMDA in two important respects. First, the judicial analysis for removal is the same as in initial custody disputes: an open best

---

[192]*See* 750 Ill. Comp. Stat. Ann. 5/609 (West 1993) (providing that a court may grant removal when "such approval is in the best interests of such child or children. The burden of proving that such removal is in the best interests of such child or children is on the party seeking removal...").

[193]*Id.*

interest test.[194] Second, the custodial parent must convince the court that the relocation is justified.

In 1988, the Illinois Supreme Court in In re Marriage of Eckert[195] interpreted the factors that lower courts should apply in relocation cases. Drawing heavily on D'Onofrio, the Eckert court directed trial courts considering relocation requests to assess the likelihood that the move will improve the quality of life for the custodial parent and the child, the motives of both parents in seeking and opposing removal, the visitation rights of the noncustodial parent, and whether the court can devise a realistic and reasonable visitation schedule.[196] Eckert also affirmed the statutory scheme requiring courts to place the burden of proving the child's best interest on the custodial parent.[197]

The lower courts' decisions under Eckert and the removal statute are troubling. Carl W. Gilmore and Gunnar J. Gitlin recently conducted a district-specific review of appellate removal decisions following Eckert.[198] After analyzing all five appellate district court decisions, the authors point to marked inter-district differences. One district almost always allows removal.[199] Another district almost never always removal.[200] Three districts allow removal upon a showing of economic necessity.[201] Though these three districts have not defined economic necessity clearly, usually serious economic problems, such as long-term unemployment or underemployment, will suffice.

These results point out the flaw in the Illinois approach. Placing the burden on the custodial parent and applying the multi-factored best-interest test fails to produce consistent results state-wide. Whether a custodial parent can relocate outside of Illinois should not, as a matter of policy, turn on the "luck of the district" in which she finds herself. The sort of inconsistency that

---

[194]*See* 750 Ill. Comp. Stat. Ann. 5/602 (West 1993) (following the UMDA best interest test and adding considerations of abuse and the parent's willingness to encourage a relationship with the other parent).

[195]518 N.E.2d 1041 (Ill. 1988).

[196]*Id.* at 1045-46.

[197]*Id.* at 1045.

[198]Carl W. Gilmore & Gunnar J. Gitlin, Post-Eckert Trends in Child Removal: A Review of Appellate Cases, 84 Ill. B.J. 76 (1996).

[199]*Id.* at 81-82.

[200]*Id.* at 82.

[201]*Id.* at 77-80.

allows some custodial parents to relocate, while denying others similarly situated the same opportunity (or delaying the relocation until the parent with enough resources can relocate to a more permissive district), discredits Illinois' relocation scheme.

b. Missouri

Missouri also made significant changes to the UMDA framework. In an initial custody determination, a Missouri court weighs the factors delineated in UMDA section 402 as well as considerations of abuse, the need for a continuing relationship with both parents and the parents' respective abilities to perform their functions, a consideration of which parent is more likely to allow the children frequent and meaningful contact with the other parent, and whether either party intends to change residence outside the state.[202] For custody modification cases, the Missouri legislature adopted the UMDA clause requiring a change in circumstances and a best interest analysis.[203] The modification statute, however, does not restrict the best interest analysis to consent, integration, and endangerment, resulting in an essentially *de novo* determination.[204] Furthermore, the modification statute's change of circumstance requirement is explicitly triggered by a change of residence.[205] Therefore, even when a custodial parent relocates after the court has previously determined that she should have custody, the noncustodial parent can challenge the relocation by litigating a broad, best interest inquiry.

Not surprisingly, Missouri appellate court decisions are inconsistent. From 1995-1996, two different divisions within the Eastern District Court of Appeals have each reported two relocation decisions. In making their decisions, each court purported to apply a four-part test: 1) the prospective advantages of the move in improving the quality of life for the children and custodial parent; 2) the integrity of the custodial parent's motives and whether one of her motives is to defeat or frustrate visitation; 3) the noncustodial parent's motives for opposing relocation and the extent to which that opposition originates from a desire to secure financial advantage; and 4) whether the relocation will allow for visitation that preserves and fosters the

---

[202]*See* Mo. Ann. Stat. § 452.375 (Vernon 1986 & Cum. Supp. 1996). The Missouri legislature added the relocation clause by amendment in 1988.

[203]*See* Mo. Ann. Stat. § 452.410 (Vernon 1986).

[204]*Id.*

[205]*See* Mo. Ann. Stat. § 452.411 (Vernon Cum. Supp. 1996).

noncustodial parent's relationship with the children.[206] Analysis of the four reported appellate cases reveals the different outcomes associated with the two different divisions, similar to the inconsistencies found in Illinois.

In Butler v. Butler, the Missouri Court of Appeals, Eastern District, Division One allowed the custodial mother to relocate.[207] The mother had primary physical custody of their son and both parents shared legal custody.[208] The custodial mother sought to relocate with her son to Tennessee so that they could join her new husband.[209] The trial court granted permission to relocate and the father appealed.[210]

In affirming, the Butler court turned to the four-part inquiry.[211] According to the court, the first factor weighed in favor of the mother because the son would have his own room and the mother would no longer need to work as a result of her husband's new job.[212] The second factor also favored the mother because her motive was to live with her new husband, not to frustrate visitation.[213] The third factor, though, favored the father because there was no evidence that he had a financial motive in opposing the move.[214] The fourth factor also supported the mother because she encouraged the son's relationship with his father and the move allowed for a realistic opportunity for visitation.[215] Because the majority of the factors weighed in favor of the mother, the court affirmed the relocation.

In Riley v. Riley, [216] the same court as in Butler reversed the lower court's denial of the custodial mother's relocation motion. In Riley, the mother had custody of the younger son and the father had custody of the older son.[217] The

---

[206]*See* Effinger v. Effinger, 913 S.W.2d 909, 912 (Mo. Ct. App. 1996); Butler v. Butler, 922 S.W.2d 18, 20 (Mo. Ct. App. 1996); Riley v. Riley, 904 S.W.2d 272, 277 (Mo. Ct. App. 1995); McElroy v. McElroy, 910 S.W.2d 798, 803 (Mo. Ct. App. 1995).

[207]Butler, 922 S.W.2d at 19.

[208]*Id.*

[209]*Id.*

[210]*Id.* at 19-20.

[211]*Id.* at 20-21.

[212]*Id.*

[213]*Id.* at 21.

[214]*Id.*

[215]*Id.*

[216]904 S.W.2d at 272.

[217]*Id.*

mother remarried and sought to move with her new husband upon his job transfer to Texas.[218] The father opposed the relocation and claimed that if the mother moved, the trial court should transfer custody to him.[219]

In applying the four-part test, the Riley Court concluded that the trial court should have allowed the relocation. The first factor was debatable as to whether the son's already high quality of life would improve as a result of the move. The court found, however, that it favored the mother because there was no evidence that the relocation would diminish his quality of life.[220] On this point, the court emphasized the mother's and new husband's involvement in the son's church group. Also, the mother provided a tutor for the younger son, while the father didn't for the older son.[221] In addition, the court indicated that the mother's quality of life would improve by relocating to Texas with her new husband.[222] The second factor also supported relocation because the evidence did not show that the mother and her new husband sought the job transfer, nor that the mother was trying to defeat the father's visitation rights.[223] The third factor was in the mother's favor because the father attempted to use the relocation issue to lower his support obligations.[224] Finally, the fourth factor showed that there was an opportunity for preserving and fostering the father's and child's relationship.[225] Although there was some evidence that the mother didn't comply with the visitation schedule following the move, the court found that the mother was not interfering with the father's visitation.[226] Thus, the court granted the mother's request to relocate.

Several important observations emerge from these two opinions. First, Division One allowed a move that arguably did not improve the child's quality of life, though it did improve the custodial mother's quality of life.[227] Second, the court was willing to override the lower court's fact-finding to allow

---

[218] *Id.*

[219] *Id.*

[220] *Id.* at 275-77.

[221] *Id.* at 277.

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.* at 277-78.

[226] *Id.*

[227] *Id.* at 277.

relocation in Riley.[228] Third, in allowing relocation, the court emphasized traditionally conservative notions—that the mother wouldn't have to work in Butler,[229] and that the parents were involved in the son's church group in Riley.[230] Thus, one can surmise that Division One will allow a relocation for the "right" reasons, even if the move will not necessarily improve the child's quality of life.

Contra to Division One, Division Three denied relocation in the two reported cases from the previous two years. In McElroy v. McElroy,[231] the court affirmed the trial court's transfer of custody from the father to the mother. The father had physical custody of their two children and the parents shared joint legal custody.[232] The father remarried and then quit his job because of health-related problems.[233] The father testified that he looked for work in Missouri and then found a job in Iowa, 30 miles from the Missouri border.[234] The mother challenged the relocation and sought a custody modification, which the trial court granted.[235]

In affirming the trial court's denial of the relocation, the McElroy court applied the same four-part test.[236] The first factor favored the custodial father because the move was potentially economically necessary and the children's school performances were at the same level they had been prior to the relocation.[237] The court found that the second factor, however, favored the noncustodial mother because the father did not provide the names of employers related to his purported attempts to find work in the St. Louis area.[238]. Additionally, he did not confirm visitation dates ahead of time and

---

[228] *Id.* at 277-78 (acknowledging that "some evidence" existed showing the mother had not complied with the visitation schedule since her move to Texas).

[229] 922 S.W.2d at 21.

[230] 904 S.W.2d at 277.

[231] 910 S.W.2d at 801.

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.* at 801-02.

[236] *Id.* at 803.

[237] *Id.*

[238] *Id.*

often changed them.[239] The third factor also favored the noncustodial mother because neither parent had to pay child support, and hence, the mother's motives in opposing the relocation were not financially related.[240] The fourth factor also favored the mother, according to the court, because the move would prevent her from enjoying the same level of involvement in the children's activities.[241] Thus, the court upheld the custody modification.

The McElroy decision stands on weak legs. Most importantly, the fourth factor favored the mother, according to the court, because the move would cut back on the active role she played in the children's lives.[242] While the court's point is undoubtedly true, the court diverges from the supposed inquiry, which is whether visitation can occur such that the relationship between the noncustodial parent and child can be fostered and preserved. Any move of distance will inevitably reduce the noncustodial parent's day-to-day involvement with the children. That reduction, however, does not mean that an alternate visitation schedule will diminish the relationship between the noncustodial parent and children.[243] In such instances, courts can award more extended, uninterrupted visits (*e.g.*, weekends, holidays, and summers) that can achieve the goal associated with the fourth factor. Additionally, the court concluded that the father had ill motives from the fact that he did not provide the names of the St. Louis employers from which he sought employment and because he had been difficult in negotiating visitation.[244] Neither of these facts shows that his motive in accepting the job and relocating was to frustrate visitation. Moreover, the court acknowledged that the move was potentially economically necessary (*i.e.*, the father's economic situation improved dramatically as a result of the move because his job in the new town paid $42,000 a year, whereas both he and his new wife were unemployed in St. Louis).[245] The court fails to discuss how this factor was counter-balanced by the others.

---

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] *Cf.* D'Onofrio, 365 A.2d at 30 (asserting that an alternate visitation schedule of several uninterrupted visits a year may "well serve the paternal relationship better than the typical weekly visit which involves little if any exercise of real paternal responsibility.").

[244] McElroy, 910 S.W.2d at 803.

[245] *Id.*

In essence, the McElroy court upheld the lower court's new, full-scale best interest inquiry by squeezing its findings into the four factors. As previously discussed in this paper, such re-litigation can be emotionally trying for children.[246] Just three years after the original divorce decree, the children in McElroy had to testify in the relocation litigation regarding the parent with whom they wanted to live and which parent they trusted more.[247] Both children also underwent evaluations with psychologists hired by each parent.[248] The psychologists' reports resembled an initial custody assessment, focusing primarily on the children's emotional attachments to their parents.[249] The course of litigation failed to provide the children the important sense of finality and stability in their relationship with the custodial parent.[250]

In Effinger v. Effinger,[251] which was written by the same appellate judge who wrote the McElroy opinion, the court upheld the trial court's denial of the custodial mother's request to move to Illinois. Prior to seeking a divorce, the mother left the marital home and moved with the two children to the Illinois town in which her parents lived, 115 miles away.[252] Had the mother stayed in Missouri, she would have faced dire economic straits.[253] She was unemployed and, as a result, the court's temporary order providing for support and maintenance created an approximate $1,000 shortfall of her monthly living and child-related expenses.[254] In Illinois, however, she had arranged to live in a house owned by her mother, though the house was near an area that flooded, creating a swamp on the property.[255] She had also secured employment as a hair stylist.[256] After her departure from the marital home, the mother refused

---

[246]*See supra* note 56.

[247]McElroy, 910 S.W.2d at 802 (the children were only eight and eleven at the time of the relocation hearing).

[248]*Id.*

[249]*Id.*

[250]*See supra* note 54.

[251]913 S.W.2d at 912.

[252]*Id.* at 910-11.

[253]*Id.* at 911.

[254]*Id.*

[255]*Id.*

[256]*Id.* at 911-12 (the mother did not have to pay child care in Missouri due to her unemployment; because her mother would assist in child care in Illinois, it was unclear how much child care costs would add to her monthly expenses in Illinois).

the father's requests to see the children until he signed an agreement providing for visitation.[257]

The Effinger Court turned to the four-part test and found that the trial court properly denied the mother's relocation request. The court concluded that the first factor favored the noncustodial parent because the evidence did not show that the move would necessarily improve the children's general quality of life.[258] The court indicated that at the same time, their quality of life would not diminish if they stayed.[259] Under the second factor, the court found that the trial court "could have found" that the mother sought to distance herself from the husband, based on her previous demand that the father sign the separation agreement before seeing the children.[260] The court did not find a financial motive under factor three.[261] Finally, the court found that the fourth factor favored the mother because the father could enjoy reasonable visitation.[262]

Effinger is also subject to criticism. The court took an approach exactly the opposite of that of the Riley court with respect to quality of life. In both cases, the new location did not necessarily improve the child's quality of life.[263] In Riley, the court found, however, that moving would not diminish the child's quality of life.[264] In Effinger, by contrast, the court found that staying would not diminish the child's quality of life.[265] In addition, the Riley court emphasized that the move would improve the mother's quality of life because she would join her new husband.[266] The Effinger Court simply ignores the benefits of the move for the mother: an opportunity to be close to her family and gainful employment.[267] While Riley didn't explicitly acknowledge the connection between the mother's improved quality of life and her child's, the Effinger court simply dismissed this component of the first factor. Moreover,

---

[257] *Id.* at 911.

[258] *Id.* at 913.

[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *See* Riley, 904 S.W.2d at 276; Effinger, 913 S.W.2d at 913.

[264] 904 S.W.2d at 276.

[265] 913 S.W.2d at 913.

[266] 904 S.W.2d at 276.

[267] 913 S.W.2d at 913.

the Effinger court's language indicates that the noncustodial parent will win a close case. The court stated, "Where the factors favor neither parent, or favor the noncustodial parent, the trial court's denial of the custodial parent's request to move will be affirmed."[268] By this court's analysis, the factors will favor neither parent, and hence relocation will be denied, whenever a custodial parent cannot demonstrate an improved quality of life for her child (even though hers will improve) and the father opposes the move for any reason but avoidance of financial support.

Comparison of these decisions leads to the conclusion that the fate of a custodial parent's relocation depends on the Missouri court from which she seeks legal sanction. As shown, one district in the same appellate division has made relocation easier than another district, even though both districts purport to use the same test for determining the child's best interests. If the only predictability in the system is the fact that one division will more likely grant relocation than another, the state has failed to enact a statutory and judicial decision-making scheme that is just and supportive of the new family unit.

c. Arizona

Arizona departed from the original UMDA by enacting a general statute that governs both original custody and modification determinations. The general custody statute provides that a court shall determine custody, whether originally or upon petition for modification, in accordance with the child's best interests.[269] The statute includes the five UMDA section 402 factors for determining the child's best interests and also directs the trial court to consider five additional factors: 1) which parent is more likely to allow the child frequent and continuing contact with the other parent, 2) which parent has provided primary care for the child, 3) whether one parent has coerced the other into an agreement regarding custody, 4) whether there has been domestic violence, and 5) whether a parent has committed certain crimes.[270]

An Arizona appellate court recently clarified, in In re Marriage of Pollock,[271] that a custodial mother seeking to move will have a difficult task. In Pollock, the custodial mother sought to move to New Hampshire with her eight year old daughter and new husband, who had obtained an interest in a

---

[268] *Id.* at 912 (emphasis added).

[269] *See* Ariz. Rev. Stat. Ann. § 25-403(A)-(C) (Cum. Supp. 1996).

[270] *Id.*

[271] 889 P.2d 633 (Ariz. Ct. App. 1995).

welding business there.[272] Though the financial prospects associated with the job were not well established, most of the husband's family resided in New Hampshire, and the mother believed the new environment and school system were better suited to the child's needs.[273] Neither party had substantial resources to provide for trips "very often."[274]

The Pollock court held that the custodial parent carried the burden of proving that the move was in the child's best interests.[275] Factors for a court to consider included whether the request to relocate was made in good faith; prospective advantages of the move; the likelihood that the custodial parent will comply with the modified visitation schedule; the prospective advantage of the move for improving the general quality of life for both the custodial parent and child; whether there is a realistic opportunity for visitation; the extent to which moving or not moving will affect the emotional, physical, and developmental needs of the child; and the motives of the noncustodial parent resisting the relocation.[276]

By judicial, rather than statutory creation, the Pollock Court created the same type of legal framework as Illinois. The custodial parent has the burden to show that the move is in the child's best interest under a multi-factor test that gives the trial court substantial discretion in granting or denying the relocation request. Though the decision is too new to analyze how courts will respond, it seems plausible that Arizona courts will develop the same types of inconsistencies as observed in Illinois.

d. Montana

Montana has enacted UMDA sections 402 and 409 close to their original forms, with one major exception for relocation cases.[277] In 1987, the Montana

---

[272] *Id.* at 635.

[273] *Id.*

[274] *Id.*

[275] *Id.*

[276] *Id.* at 636 (remanding the case for reconsideration in light of these factors).

[277] *See* Mont. Code. Ann. § 40-4-212 (1995). Section 40-4-212, like UMDA section 402, defines the best interests of the child. The statute includes the five UMDA factors and adds considerations of abuse and chemical dependency. The statute also creates a rebuttable presumption that the parent who has provided most of the primary care during the child's life should be awarded custody, as well as rebuttable presumptions concerning child support. Mont. Code Ann. section 40-4-219 (1995) is the modification analogue to UMDA section 409. The statute includes agreement, integration, endangerment as grounds for modification. The statute

legislature amended the modification statute to make explicit that a court may modify a prior custody decree upon finding that the custodial parent has changed or intends to change the child's residence to another state and that such modification is in the child's best interests.[278] Thus, if a custodial parent relocates or plans to relocate, a court will by-pass the agreement, integration, and endangerment requirements found in UMDA section 409 and turn to the broad best-interest analysis.

The Montana Supreme Court recently interpreted the statutory relocation provision in In re Marriage of Elser.[279] In Elser, the mother had sole physical custody of the child and shared legal custody with the father.[280] The separation agreement provided that neither parent would remove the child from Montana without the other parent's or court's permission.[281] The mother applied to a radiology program in Missoula, Montana, but was rejected.[282] She was subsequently accepted to a program at the University of Kansas and planned to enroll.[283] The father objected to her proposed relocation and successfully requested that the trial court designate him as the primary residential custodian.[284]

The Elser court applied the modification statute on its face and determined that a relocation in itself was sufficient for a trial court to consider modifying custody.[285] According to the court, once a relocation occurs or is about to occur, a trial court should conduct a best interest inquiry regarding a potential custody modification.[286] The court upheld the trial court's best interest analysis, which emphasized the fact that rescheduling custody with the noncustodial father was not possible given the father's seasonal employment

---

adds, however, two additional grounds: 1) the desires of the child if the child is 14 years or older and 2) the custodian's willful and consistent refusal to allow contact with the noncustodial parent or attempts to deny or frustrate visitation.

[278]Mont. Code Ann. § 40-4-219(f).

[279]895 P.2d 619 (Mont. 1995).

[280]*Id.* at 620-21.

[281]*Id.* at 621.

[282]*Id.*

[283]*Id.*

[284]*Id.*

[285]*Id.* at 622.

[286]*Id.*

as a construction worker.[287] The court emphasized that each parent could afford to pay for only one trip back to Montana per year, thus limiting the number of times the children could see their father while the mother was in the program.[288]

Though the facts of Elser lend sympathy to the father because of the dramatic, yet seemingly temporary, change in his access to the children (*i.e.*, the radiology program had a limited duration), the opinion suffers from an additional flaw in the best interest test as applied. The court makes no mention of the adverse consequences certain to result from the children having to leave the custodial mother.[289] The court's best interest eye is directed solely at the decreased contact between the children and the noncustodial father.[290] The trial court had determined earlier that the mother should be the custodial parent.[291] Following the divorce decree, she had continued to be their primary care-taker, notwithstanding their father's active involvement.[292] In effect, the court's decision severed the bond between the children and their custodial parent and fractured the post-divorce family unit.

2. *UMDA Conforming States*

The remaining half of UMDA states have legislative enactments and corresponding judicial opinions that mirror more closely the language and spirit of UMDA's modification scheme. Although there are variations, these states share in common a use of the endangerment standard. This section will analyze and critique how these states have relied on the endangerment standard. Of the states in this group, the Minnesota approach seems to

---

[287] *Id.* at 622-23.

[288] *Id.* at 623.

[289] *Id.* at 622-23. In essence, the court upheld the transfer of custody because 1) the change would significantly alter the contact between the children and their father; 2) their father was an active parent; and 3) the father further exhibited his concern for the children's welfare because he made child support payments and paid for day care in spite of financial difficulty. On the other side of the equation, the court should have applied the same factorial analysis, which would have shown that 1) a switch in custody would terminate the mother's custodial care of the children; 2) the mother was an active parent on a daily basis and sought to improve the family's situation by pursuing an advanced degree that would result in higher income; and 3) the mother showed her "commitment" to the children on a daily basis by feeding, clothing, bathing, transporting, and providing immediate emotional access to the children.

[290] *Id.*

[291] *Id.* at 267.

[292] *Id.*

promote a model most conducive to predictable, consistent relocation decisions that adequately support the custodial parent's ability to relocate. At the same time, Minnesota protects the noncustodial parent from vindictively motivated relocations and protects the child from arguably extreme relocations that would endanger the child's emotional, mental, or psychological well-being.

a. Colorado

As discussed above in section III-C, the Colorado Supreme Court in Francis directed lower courts to apply the endangerment standard instead of the best interest standard in relocation cases.[293] The Francis court directed its attention to Colorado's closely parallel version of UMDA section 409.[294] The court explained its eventual holding by noting the rationale of the statute:

> In 1971, Colorado enacted the Uniform Dissolution of Marriage Act (UDMA), based upon the Uniform Marriage and Divorce Act. The UDMA recognizes and carries out the philosophy that assuring stability and finality in a child's custody is an important factor in the post-dissolution emotional health of a child. Section 14-10-131, which has historically governed modification of custody in Colorado, implements the concept that emotional stability in a child's life is of great significance. In order to promote such emotional stability, the legislature protected the custodial relationship of parent and child by making it difficult to modify.[295]

Based on the underlying purpose of the statute, the Francis court concluded that the modification provisions applied equally to relocation as they did to any other motion brought by the noncustodial parent that would effectively alter the child's physical custodial arrangement if granted.[296]

---

[293]919 P.2d at 783.

[294]*See* Colo. Rev. Stat. Ann. § 14-10-131 (West 1989) (providing for modification of sole physical custody and following the two year prohibition against modification with the endangerment "safety valve;" the statute also follows the consent, integration, and endangerment standard requirements). Modification of joint custody is governed by Colo. Rev. Stat. Ann. section 14-10-131.5, which provides for modification upon a general best interest showing. The Francis court clarified that Colo. Rev. Stat. Ann. section 14-10-131 applies to relocations where one parent has been awarded either sole legal and physical custody, or sole physical custody and joint legal custody. *See* 919 P.2d at 779.

[295]919 P.2d at 780 (citations omitted).

[296]*Id.* at 782.

A close reading of Francis, however, reveals a fundamental flaw in the court's interpretation of the modification statute. After establishing a presumption in favor of removal, the court correctly goes on to indicate that the noncustodial parent can overcome the presumption by showing consent, integration, or endangerment.[297] Such endangerment includes "threats to the child's physical health and emotional development."[298] If the noncustodial parent proves endangerment, then the trial court must deny the relocation request.

The court should have stopped at that point. Instead, it provides an additional basis for overcoming the presumption in favor of relocation:

> If, however, there is no credible evidence of endangerment, then the noncustodial parent can also overcome the presumption by establishing by a preponderance of the evidence that the negative impact of the move cumulatively outweighs the advantages of remaining with the primary care-taker. A trial court should allow the residential custodian to move with the child unless the evidence shows that the disadvantages of moving are great enough to outweigh the advantage of staying with the same parent.[299]

On this latter showing, a court can consider whether the removal will enhance the quality of life for the child and the custodial parent, whether the court is able to establish a reasonable visitation schedule for the noncustodial parent, whether there is a support system of family or friends at the new and/or old location, and educational opportunities for the children at the new and old location.[300] In other words—a modified best interest test.

The genesis of the problem seems to lie in statutory interpretation. The court uses almost identical language in the above emphasized passage as that in the Colorado modification statute. According to the Colorado statute (as in UMDA section 409), a court can modify the custody arrangement when "[t]he child's present environment endangers his physical health or significantly impairs his emotional development and when the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child."[301] This clause is clearly conjunctive, requiring both endangerment and cumulative advantage. The Francis court, however,

---

[297] *Id.* at 784.

[298] *Id.*

[299] *Id.* (emphasis added).

[300] *Id.*

[301] Colo. Rev. Stat. Ann. § 14-10-131(2)(c).

converts the clause into a disjunctive either/or. That is, the noncustodial parent can overcome the presumption in favor of relocation either by showing endangerment or cumulative advantage in staying put. If Colorado's lower courts follow Francis literally, they will be back where they started: possessing wide discretion to decide for themselves the likely benefits of the move.

b. Washington

With slight alterations, the Washington legislature also adopted a custody modification scheme similar to the UMDA.[302] Rather than the UMDA's "change" in circumstance, the statute requires "substantial change."[303] Drawing on the UMDA, the statute equates a substantial change with consent, integration (*i.e.*, the child has integrated into the noncustodial parent's home with the custodial parent's consent), and detriment (versus endangerment) to the child's physical, mental, or emotional health.[304] In cases of detriment, the statute, like the UMDA, requires that the present environment pose a detriment to the child and that the harm caused by changing custody is outweighed by the advantages.[305]

Although the Washington Supreme Court has not recently decided a post-decree relocation case, its recent In re Marriage of Sheley [306] decision provides guidance. In Sheley, the trial court granted the father's request to award the mother primary custody of the child only if she remained in the Seattle area.[307] The mother, who had been the primary care-taker, sought to relocate to Texas where she had an outstanding job offer.[308] The mother also had family located throughout Texas.[309] While the court upheld the trial court's denial of the mother's request to relocate with her child, the court held that the

---

[302]*See* Wash. Rev. Code Ann. § 26.09.260 (West 1986 & Cum. Supp. 1996).

[303]Wash. Rev. Code Ann. § 26.09.260(1).

[304]Wash. Rev. Code Ann. § 26.09.260(2)(a)-(c). A court can also modify custody when a parent has been found in contempt at least twice within three years for failing to comply with the parenting plan or has been convicted of custodial interference. Wash. Rev. Code Ann. § 26.09.260(d).

[305]Wash. Rev. Code Ann. § 26.09.260(2)(c).

[306]895 P.2d 850 (Wash. 1995).

[307]*Id.* at 853-54.

[308]*Id.*

[309]*Id.*

noncustodial parent carries the burden of showing that the "proposed relocation would be detrimental to the child in some specific way that is not inherent in the geographical distance between the parents if the move is approved."[310] Because the award of custody in Sheley was an initial custody award, and hence more open-ended than a post-decree modification, the court did not interpret the modification statute directly. Nevertheless, the required showing of detriment in a way that is not associated with the move would seem to apply in a modification case as well.

c. Kentucky

Like Colorado, Kentucky has adopted both the two year prohibition against modification post-initial award (with a safety valve for endangerment) and the agreement, integration, and endangerment standards for any other modification motion.[311] Kentucky has added specific factors regarding the endangerment consideration.[312] These include: 1) the interaction and interrelationship between the child and his parent, siblings, and others affecting his best interests; 2) the mental and physical health of all those involved; 3) repeated failure to observe visitation, child support, and other provisions of the divorce decree; and 4) whether domestic abuse, if any, has affected the child and the child's relationship to both parents.[313]

Thus, in Kentucky, a court could consider, for example, whether a relocation would endanger a child's mental or emotional health because of the adverse effect on the child-noncustodial parent relationship. A relocation case involving a child who enjoys a particularly strong relationship with the noncustodial parent that would be severely curtailed as a result of the relocation, and consequently is likely to threaten the child emotionally and/or mentally, would not be allowed.[314] Because this standard focuses on endangerment, however, it is different than the best interest consideration in initial custody determinations.[315]

---

[310]*Id.* at 856.

[311]*See* Ky. Rev. Stat. Ann. § 403.340 (Michie/Bobbs-Merrill 1984 & Cum. Supp. 1996).

[312]Ky. Rev. Stat. Ann. § 403.340(3)(a)-(d).

[313]*Id.*

[314]*Cf.* Wallerstein & Tanke, *supra* note 42, at 319 (discussing the need to protect a child when the child's most important relationship is with the noncustodial parent).

[315]*See* Ky. Rev. Stat. Ann. § 403.270 (Michie/Bobbs-Merrill 1984 & Cum. Supp. 1996) (following the UMDA version of the best interest standard for initial custody determinations).

The Kentucky Supreme Court has explicitly determined that this modification scheme applies to relocation cases. In Wilson v. Messinger,[316] the custodial mother proposed to move with her 14 year old daughter to West Virginia. The mother had been the custodial parent for six years prior to the proposed relocation.[317] In upholding the trial court's decision that the father had failed to show endangerment, the court quoted an earlier relocation case flatly explaining that "provisions of this subsection [K.R.S. 403.340(2)] intend to inhibit further litigation initiated simply because the noncustodial parent, or the child, or both, believe that a change in custody would be in the child's best interests."[318] The court concluded by noting that "a custodial parent cannot, in today's mobile society, be forced to remain in one location in order to retain custody."[319]

The Kentucky legislative and judicial responses support the UMDA's original intent of stabilizing the post-divorce family and protecting the child.[320] The Messinger court correctly pointed to the difference between the best interest analysis upon an initial custody determination and the higher endangerment standard for modifying the custodial arrangement of a post-divorce family unit.[321] The Kentucky statutory scheme contemplates the denial of relocation when the relocation would alter the relationship between the child and the noncustodial parent in a way that the child would be threatened mentally and emotionally.[322] In such a situation, the court would still have to conclude that the cumulative benefits of switching custody outweighed the harm.[323] That is, a court could not make the mistake that the Elser court did by looking only to the negative consequences connected to

---

[316]840 S.W.2d 203 (Ky. 1992).

[317]*Id.*

[318]*Id.* at 204 (quoting Quisenberry v. Quisenberry, 785 S.W.2d 485 (Ky. 1990)) (reference to cited statute in original).

[319]*Id.*

[320]*See* Unif. Marriage and Divorce Act § 409 cmnt, 9A U.L.A. 629. *Cf.* In re Marriage of Francis, 919 P.2d at 780 (noting that the philosophy of the UMDA is to assure stability and finality in the child's custody arrangement, which is an important part of the child's emotional health post-divorce).

[321]840 S.W.2d at 204. *Cf.* Unif. Marriage and Divorce Act § 409 cmnt, 9A U.L.A. 629 (describing the higher standard for custody modifications).

[322]*See* Ky. Rev. Stat. Ann. § 403.340(3)(a),(b) (providing for considerations of the child's relationships with both parents and the parties' mental health).

[323]*See* Ky. Rev. Stat. Ann. § 403.340(2)(c).

leaving the noncustodial parent.[324] Rather, after finding such endangerment, a court would have to determine that the benefits associated with awarding primary custody to the noncustodial parent outweighed the adverse consequences, including the change in the child's relationship with the custodial parent.[325] This is the limited type of situation where judicial intervention seems appropriate: the relocation would truly endanger the child, and changing custody from the custodial parent to the noncustodial parent represents a cumulative advantage for the child.

The primary drawback of the Kentucky approach stems from the paucity of discussion of motive. As mentioned above in section II, courts almost universally deny a relocation that is driven by the custodial parent's attempts to eliminate or frustrate the noncustodial parent's access to the child.[326] Similarly, most states condemn a noncustodial parent's lack of good faith in opposing the relocation.[327]

Kentucky's position on motive is unclear, as the statute and opinions have not addressed it. Other states' views on motive, however, seem correct. The noncustodial parent should not be able to oppose relocation as a means to control the custodial parent or to force lower financial demands. Likewise, the custodial parent should not use relocation as a retaliatory measure against the noncustodial parent or as a threat in order to garner support or concessions beyond those to which she is legally entitled. A relocation that is pursued or opposed as a "trump card" in pre- or post-separation negotiations (*i.e.*, "I'll move unless..." or "I'll oppose your move unless..."), or as a means to punish the other for inter-personal strife, undermines the rebuilding that needs to occur post-divorce and should be prohibited as a matter of policy. Ultimately, the financial and emotional consequences of one parent pursuing or opposing relocation as a sword against the other parent come to rest on the child, who has already suffered from the divorce and custody battle process.

---

[324]*See supra* note 290.

[325]*Cf.* Bruch & Bowermaster, *supra* note 41, at 303 (concluding that relocation should be allowed only upon a showing of "prejudice" to the child's welfare and a demonstration that switching custody is a cumulative advantage to the child).

[326]*See supra* section II.

[327]*See* Elrod, *supra* note 67, at § 17.33 (explaining that courts will consider the noncustodial parent's motives in resisting the move).

d. Minnesota

The Minnesota version of the UMDA also parallels the original act.[328] Departing only slightly from the UMDA, Minnesota's modification statute prohibits a motion to modify the custody decree for one year, instead of two.[329] After the first motion, however, the noncustodial parent cannot bring subsequent modification motions for two years.[330] The statute also adopts the consent, integration, and endangerment bases for modification.[331]

In Silbaugh v. Silbaugh,[332] the Minnesota Supreme Court clarified the standard for relocation cases. The mother in Silbaugh had primary physical custody of the two children and shared joint legal custody with the father.[333] The mother wanted to move to Arizona to pursue a career opportunity and to establish a better lifestyle for her and the children.[334] The father opposed the request to relocate and sought to modify physical custody if the mother left the state.[335]

The Silbaugh court held that a relocation would be allowed absent a showing either of endangerment or a motivation that the relocation was intended to interfere with visitation.[336] The court reviewed the statutory provisions and previous case law leading to this conclusion.[337] In Auge v. Auge,[338] the court determined that the modification statute created a presumption that relocation would be allowed. That same year, the court in Gordon v. Gordon[339] extended the principle to instances in which the parents share joint legal custody and one parent has sole physical custody. In Sefkow

---

[328]*See* Minn. Stat. Ann. § 518.18 (West 1990).

[329]Minn. Stat. Ann. § 518.18(a).

[330]*Id.*

[331]Minn. Stat. Ann. § 518.18(d)(i)-(iii).

[332]543 N.W.2d 639 (Minn. 1996).

[333]*Id.* at 640.

[334]*Id.*

[335]*Id.*

[336]*Id.* at 641.

[337]*Id.* at 641.

[338]334 N.W.2d 393 (Minn. 1983).

[339]339 N.W.2d 269, 271 (Minn. 1983).

v. Sefkow,[340] the court turned to the modification statute and visitation statute[341] and held that a noncustodial parent must show that either 1) the relocation is not in the best interests of the child and it would endanger the child's health and well-being or 2) the relocation is intended to interfere with visitation. In upholding this string of precedents, the Silbaugh court explained:

> [O]ur concern must be for the Silbaugh children and their need for a sense of stability in their familial arrangements. The statutes that spell out the procedure for a modification of custody manifest the legislature's preference for permanence and closure on custody matters, except under the most extraordinary circumstances, where changed circumstances endanger the child's physical or emotional health.[342]

To overcome this burden, the court concluded, the custodial parent must offer evidence beyond mere allegations.[343]

Concluding this section with the Minnesota approach is deliberate. Minnesota's legislature and supreme court have put into place a legal relocation scheme that echoes the concerns expressed in this paper. The requirement that the noncustodial parent demonstrate either that the relocation will endanger the child's physical, mental, or emotional health, or alternatively that the custodial parent has an ill-motive, respects the custodial parent's decisions regarding the new family unit. Importantly, children will be less subject to the trauma of yet another round of custody litigation. Additionally, disruption in the custodial parent-child relationship will be less frequent and less vulnerable to the vagaries of different courts. When the relocation does threaten the child and the benefit of shifting custody to the noncustodial parent outweighs the harm of relocating, judicial intervention is appropriately triggered to protect the child. The motive element prevents a custodial parent from using the move to threaten the noncustodial parent or to frustrate his access to the child.

The one area for improving the Minnesota scheme lies in returning to Kentucky's approach to endangerment.[344] Kentucky's explicit endangerment framework provides lawyers and clients with more clarity. Additionally, the

---

[340]427 N.W.2d 203, 214 (Minn. 1988).

[341]*See* Minn. Stat. Ann. § 518.175 (West 1990) (prohibiting relocation when the motive of relocation is to interfere with the noncustodial parent's visitation rights).

[342]Silbaugh, 543 N.W.2d at 642.

[343]*Id.*

[344]*See supra* this section.

Kentucky model, as discussed, more readily supports the argument that relocation should not occur when the move interferes with the child's relationship with the noncustodial parent in such a way that the child is at risk emotionally and/or mentally and the cumulative benefits of switching custody outweigh the harm. While one could make this argument under Minnesota law, the Kentucky model seems to support the argument more clearly.

V. CONCLUSION: THE MODEL CRITIQUED AND SUPPORTED

Like all reform models, the "UMDA + motivation considerations" model, as best demonstrated in Minnesota, has its own weaknesses. First, the consequence of imposing an endangerment standard may mean that parents will more stridently litigate custody at the front-end divorce stage.[345] Even assuming, *arguendo*, that prescient parents who anticipate the other's future relocation will dig in their heels harder at the beginning, the avoidance of re-litigation post-decree spares the child from a second traumatic experience and promotes the child's reliance on the post-divorce family unit and custodial parent. Second, the model does not allow room for the child's preferences, except for the extent to which the child's expressions denote endangerment. By contrast, other courts have taken into consideration the child's preferences, particularly those of adolescents.[346] If parents from intact families, however, can make moves affecting adolescents (including decisions whether or not to allow the child to stay with friends or family to complete schooling in the home town) without judicial intervention, then a custodial parent should be similarly respected. Finally, the model admittedly pays less heed to the noncustodial parent's interests in maintaining more easily accessible, and perhaps more frequent, contact with his children. Though Wallerstein's and Tanke's position that the quality, not the quantity, of visitation positively impacts child development is well-grounded in their own and others' research, some courts and commentators take different positions.[347] In this regard, courts should have the flexibility to grant liberal, extended visitation (*e.g.*,

---

[345]*Cf.* Moline, *supra* note 133 (quoting family law specialists who predict increased litigation for joint custody at the initial custody decree stage).

[346]*See* Burgess, 913 P.2d at 483 (trial court can consider the preferences of the Burgess children, aged 10 and 13); Wanda E. Wakefield, Desire of Child as to Geographical Location of Residence or Domicile as Factor in Awarding Custody or Terminating Parental Rights, 10 A.L.R. 4th 827 (1981 & Cum. Supp. 1996) (citing courts that consider the child's preferences and courts that do not consider the child's preferences); Elrod, *supra* note 67, at § 17.29 (noting that some courts consider the child's preferences in relocation cases).

[347]*See supra* note 60.

summer and holiday visitation that provides an opportunity for interaction on a daily basis) that promotes the child's relationship with the noncustodial parent, keeping in mind the goal of high quality visitation.

In spite of these drawbacks, the model reflects a policy that appropriately balances the concerns of the new family unit as a whole, as well as the child, custodial parent, and noncustodial parent as individuals. The model provides the new family unit greater predictability in judicial outcomes than one that gives courts wide discretion. More children will be spared from having to witness their parents re-open the battle wounds of a full-fledged custody dispute. Those children facing physical, emotional, or mental threat by relocating will be protected by judicial intervention. In such situations, a trial court appropriately should consider the emotional or mental harm resulting from a relocation that would eliminate or result in a dire curtailment of a strong child-noncustodial parent relationship. The court, however, would still have to find that the custody switch would be more advantageous than harmful to the child. Finally, the motive consideration eliminates the possibility that one parent will use relocation (either by pursuing it or opposing it) as a weapon against the other. Together, these improvements hold promise as a model for change.