

## Divided parents, shared children Conflicting approaches to relocation disputes in the USA

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### 1. Introduction

Divorce and separation sets former partners, even those who share children, on diverging paths. These paths often involve remarriage, changes in employment, development of different circles of friends, and, in many instances, relocation to distant locations. The increasing disconnection of the lives of parents may make it difficult for parents to achieve the ideal 'bi-nuclear' family many policymakers envision for the children of divorced families. Custodial parents, however, may face special challenges as they seek to forge their own separate path, because non-custodial parents may seek judicial intervention to prevent their relocation.

Custody relocation disputes pose intractable dilemmas for courts. The cases often pit two well-intentioned parents against each other, in many cases undermining a prior history of inclusion of both parents in their children's lives. Non-custodial parents are often distraught at the thought of losing frequent access to their children. Custodial parents are similarly distressed to learn that their efforts to define their own lives are being thwarted by their previous partner in a now-defunct marriage. Each parent has a deep interest in the outcome of this dispute. The custodial parent seeks self-determination, freedom of movement and a continued custodial relationship with the child. The non-custodial parent seeks to remain in place and preserve a geographically close relationship with the child. Courts must identify the best interests of the children amidst these multiple and conflicting interests.

While courts grapple daily with children's best interests in custody disputes attendant to divorce and separation, relocation disputes are qualitatively different. In these disputes, judges make decisions that could well determine the future course of custodial parents' lives. Judges may determine whether custodial parents will be able to remarry, follow their spouse to a new location, take a new career position, attend school, or rejoin family. A doctrinal approach that assesses only children's best interests ignores these key aspects of relocation disputes.

The United States is a highly mobile society. Almost 40 million people move to a new residence each year. While close to 25 million remain in the same county, 8 million move to a different county in the same state, and 5.7 million move to a different state.<sup>1</sup> Approximately 1.3 million move transnationally every year.<sup>2</sup> Movers are almost equally divided between males and

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1 US Census Bureau, Geographical Mobility, 2005-06, *Current Population Survey*, March, 2006, Table 1.

2 *Ibid.*

females.<sup>3</sup> However, since the vast majority of custodial parents are mothers, most of those who need judicial permission to relocate with their children are women.<sup>4</sup> Thus, relocation doctrine impacts most men and women differently, with men often trying to keep their children geographically close to them and women typically seeking to move with their children. At the same time, most relocation after divorce or separation never reaches a court; geographical distance from one parent is now a common feature of childhood for many children of divorced or separated parents.

In this article I examine the challenges posed by relocation disputes. Section 2 discusses the varied state legislative and judicial approaches to relocation disputes in the United States, as well as proposed model statutes and principles for resolution of these disputes. As described more fully below, relocation doctrine exhibited a trend in the mid-1990s towards reducing legal barriers to relocation. However, more recent changes have gone in the opposite direction, imposing notice requirements and relieving the burden of proof on the non-custodial parent.<sup>5</sup> In addition to these legal standards, I also describe proposed model approaches to relocation, which themselves evidence the deep ambivalence reflected in the varied doctrinal approaches.

I review the academic literature concerning relocation disputes in the United States in Section 3. This scholarship has analyzed relocation disputes from a wide range of perspectives. These perspectives include: conflicting interpretations of the social science research about the best interests of children concerning relocation; competing ideologies of the post-divorce family; use of alternative dispute resolution strategies; constitutional rights of the parents; safety of domestic violence victims; and proposals to reshape relocation disputes to eliminate the geographic presumption in favor of the current location and remedy the economic effect of a denial of permission to relocate. This literature demonstrates the complex nature of relocation disputes and suggests that relocation doctrine in the US should be realigned to address these complexities. The prevalence of post-divorce relocation also indicates that more important than fine-tuning relocation doctrine, states should take ameliorative steps to ensure that families are better prepared to support their children through the common experience of relocation and the many other changes that parental separation and divorce bring to the lives of children.

## 2. The law of parental relocation: doctrinal choices in the states

The number of reported judicial decisions regarding relocation disputes has grown ten-fold over the past twenty-five years.<sup>6</sup> The outcome of these disputes is rarely predictable. In a recent study, I found that of the 602 custody relocation cases reported on a major electronic legal database, the custodial parent was granted permission to relocate in 41% of cases, denied permission in 43%, and the case was remanded for further proceedings in 16% of the cases.<sup>7</sup> Increased judicial intervention has also led to greater legislative activity by states, some of which have passed legislation concerning relocation within the last ten years.<sup>8</sup> These disputes have also drawn the attention of non-governmental bodies in the United States. The American Academy of Matrimonial Lawyers has proposed a *Model Relocation Statute*, and the American Law Institute has

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3 *Ibid.*

4 T. Glennon, 'Still Partners? Examining the Consequences of Post-Dissolution Parenting', 2007 *Family Law Quarterly*, p. 118 (noting that of 602 cases reviewed in the time period from June 1, 2001 to June 1, 2006, 90% involved custodial mothers seeking to relocate).

5 See Section 2, *infra*.

6 Glennon, *supra* note 4, p. 106.

7 *Ibid.*, p. 123. Most trial court decisions are not available on Westlaw, the electronic legal database used for this research, so these figures mostly involve cases that reached the appellate level.

8 See Section 2, *infra*.

included resolution of relocation disputes in its *Principles of the Law of Family Dissolution*.<sup>9</sup> The National Conference of Commissioners of Uniform State Laws is currently drafting a proposed uniform law on the relocation issue.<sup>10</sup>

Researchers writing in the 1990s and early 2000s noted that relocation doctrine had been moving in the direction of reducing barriers to relocation by the custodial parent. High profile cases in New York and California in the mid-1990s seemed to establish a new norm. In *Tropea v. Tropea*, the New York Court of Appeals rejected its prior approach to relocation, which had required parents who wished to relocate to demonstrate ‘exceptional circumstances.’<sup>11</sup> The Court instead adopted a ‘best interests of the child’ test that focuses on a range of factors related to the child’s interests, including the effect of relocation on the child’s relationship with the non-custodial parent and whether the child’s life will be enhanced by the move.<sup>12</sup> The burden to demonstrate that the move is in the child’s interests was placed on the parent who wishes to relocate.<sup>13</sup> That same year, *In re Burgess* provided the opportunity for the California Supreme Court to reject a standard requiring custodial parents to show that relocation is necessary.<sup>14</sup> California instead placed the burden of proof on the parent resisting relocation to demonstrate that relocation is detrimental to the children and requires a re-evaluation of custody.<sup>15</sup>

A wave of academic scholarship viewed these two cases as setting a clear trend favoring relocation.<sup>16</sup> Several other state courts and legislatures joined that trend. For example, the Colorado courts quickly followed and adopted a presumption in favor of relocation, and the Tennessee legislature adopted a similar presumption for parents with a significant majority of the residential time.<sup>17</sup> Not all states jumped on the liberalization bandwagon, however, and at least two states adopted more stringent requirements for relocation in the late 1990s.<sup>18</sup> The more recent trend appears to be away from a presumptive right to relocate towards a requirement that the custodial parent demonstrate that the move serves the best interests of the child. Since 2000, at least six state legislatures have adopted more stringent requirements for relocation, rejecting the more lenient standards adopted by their state courts.<sup>19</sup>

States currently employ two main types of approaches. One involves a test that determines whether the parent should be able to relocate with the child. The second, less common approach, treats relocation as a possible basis for modification of custody to the non-relocating parent.

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9 American Academy of Matrimonial Lawyers, ‘Proposed Model Relocation Act of 1997’, 1998 *Journal of American Academy of Matrimonial Lawyers*, pp. 1-24. Relocation has also received the attention of the Commission on European Family Law. K. Boele-Woelki, *Principles of European Family Law Regarding Parental Responsibilities*, 2007, Principle 3.21.

10 National Conference of Commissioners of Uniform State Laws, Drafting Committee on Relocation of Children Act, <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=281>

11 *Tropea v. Tropea*, 665 N.E.2d 145, 149 (New York 1996).

12 *Ibid.*, pp. 150-151.

13 *Ibid.*, p. 151.

14 *In re Burgess*, 913 P.2d 473, 481 (California 1996).

15 *Ibid.*, p. 482.

16 See, e.g., C. Ford, ‘Untying the Relocation Knot: Recent Developments and a Model for Change’, 1997 *Columbia Journal of Gender and the Law*, pp. 1-53; E. Terry *et al.*, ‘Relocation: Moving Forward, or Moving Backward?’, 1998 *Journal of the American Academy of Matrimonial Lawyers*, pp.167-228.

17 *In re Francis*, 919 P.2d 776 (Colorado 1996); Tenn. Code. Ann. §36-6-108 (2007).

18 In 1997, Louisiana and Arizona both passed legislation placing the burden of proof on the parent who wished to relocate. Ariz. Rev. Stat. §25-408(G)(2008); La. Rev. Stat. §9:355.13 (2007).

19 Ala. Code 1975 §30-3-169.4 (2007)(adopted in 2003); Colo. Rev. Stat. §14-10-129 (2008)(adopted in 2001); Conn. Gen. Stat. §46b-56d (2008)(adopted 2006); Fla. Stat. §61.13001(2008)(made more restrictive in 2002 and 2006); Ind. Code §31-17-2.2-5 (2008)(adopted in 2006); Minn. Stat. §518.175(3) (2008)(adopted in 2006).

### **2.1. Relocation doctrine: determining whether to permit relocation**

Many states now explicitly require custodial parents who wish to relocate to provide notice of the proposed relocation to the other parent 60 days before the move.<sup>20</sup> If the other parent refuses consent, in some states, the custodial parent must then petition the court for permission to relocate.<sup>21</sup> In other states, the parent who opposes relocation must file within a certain timeframe to prevent the relocation, otherwise the custodial parent may move.<sup>22</sup> Even where there is no specific statutory notice requirement, courts are apt to penalize a parent who moves without giving such notice, so lawyers may advise their clients not to move without first giving timely notice to the other parent.<sup>23</sup>

Where a petition is filed with a court concerning relocation, the burden of proof varies greatly among the states. Some states place the burden of proof on the parent opposing relocation to demonstrate that the move is not in the child's best interests;<sup>24</sup> some employ a neutral best interests test;<sup>25</sup> while others place the burden of proof on the parent seeking relocation to demonstrate that the move is in the child's best interests.<sup>26</sup> In most states, courts will also consider the reasons for the proposed relocation to determine whether the proposed move is made in good faith, that is, whether it has a legitimate purpose or is designed to undermine the other parent's contact with the child, as well as assessing the other parent's reasons for opposing the relocation.<sup>27</sup>

For example, Arkansas employs a presumption favoring relocation for custodial parents with primary custody. In order to rebut the presumption, the non-custodial parent must demonstrate that relocation is detrimental to the child's best interests, or that the relocation is motivated by bad faith or a desire to interfere with the other parent's visitation.<sup>28</sup> In the state of Washington, the parent opposing the relocation must prove that 'the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person.'<sup>29</sup> Indiana employs a shifting burden of proof, requiring the relocating parent to show only that the proposed relocation is made in good faith and for a legitimate reason. The opposing parent must then demonstrate that relocation is not in the best interests of the child.<sup>30</sup>

Some states, such as Colorado, have adopted a neutral best interests approach that requires the court to consider various best interests factors.<sup>31</sup> Other states employing a best interests test place the burden of proof on the relocating parent to demonstrate that the move is in the best interests of the child.<sup>32</sup> For example, Pennsylvania parents seeking to relocate must demonstrate that the move would substantially improve the quality of life for the parent and child, that they have a good faith motive to relocate, and that realistic, substitute visitation arrangements with

20 See, e.g., Ariz. Rev. Stat. §25-408(B)(2008); La. Rev. Stat. §9:355.4 (2007).

21 See, e.g., Nev. Rev. Stat. 125C.200 (2008).

22 See, e.g., Ariz. Rev. Stat. §25-408(D)(2008); Fla. Stat. 61.13001(5)(2007).

23 American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 2002, p. 375.

24 See, e.g., *Hollandsworth v. Knyzewski*, 109 S.W.3d 653 (Arkansas 2003); Cal. Fam. Code §7501 (2008); Wash. Rev. Code 26.09.520 (2008).

25 See, e.g., Colo. Rev. Stat. §14-10-129(2)(c) (2008); Conn. Gen. Stat. Ann. §46b-56 (2008); *Karen J. M. v. James W.*, 792 A.2d 1036 (Delaware Family Court 2002); *Bodne v. Bodne*, 588 S.E.2d 728 (Georgia 2003).

26 See, e.g., Ala. Code §30-3-169.4 (2007); Fla. Stat. Ann. §61.13001(8) (2008); Haw. Rev. Stat. Ann. §571-46 (2008); *Roberts v. Roberts*, 64 P.3d 327 (Idaho 2003); 750 Ill. Comp. Stat. Ann. 5/609 (2007); La. Rev. Stat. Ann. 9:355.13 (2007); Minn. Stat. Ann. §518.175(3)(c)(2008).

27 See, e.g., Wash. Rev. Code §26.09.520(5); *Gruber v. Gruber*, 583 A.2d 434 (Pennsylvania Superior Court 1990).

28 *Hollandsworth v. Knyzewski*, 109 S.W.3d 653 (Arkansas 2003).

29 Wash. Rev. Code §26.09.520.

30 Ind. Code Ann. §31-17-2.2-5 (2008).

31 *In the Marriage of Ciesluk*, 113 P.3d 135, 140-41 (Colorado 2005).

32 *Matter of Groover v. Potter*, 792 N.Y.S.2d 693 (New York Appellate Court 2005); *Vernon's Ann. Mo. Stat.* 452.377(9)(2007); *Maynard v. McNett*, 710 N.W.2d 369 (North Dakota 2006).

the non-custodial parent are available.<sup>33</sup> Alabama disfavors relocation, and the parent who seeks to change the child's principal residence must rebut the presumption that relocation is not in the child's best interests.<sup>34</sup>

A few states vary the burden of proof based on the amount of parenting time of each parent. Tennessee permits a parent with substantially more of the parenting time to relocate with the child unless the relocation does not have a reasonable purpose, poses a threat of specific and serious harm to the child, or the relocating parent's motive is vindictive. If one of those criteria is met, or if the parents share substantially equal parenting time, the court must determine whether relocation is in the child's best interests.<sup>35</sup> West Virginia also explicitly varies the burden with the amount of parenting time each parent has. A parent who has a significant majority of the custodial responsibility (70% or more of the time) may relocate 'so long as that parent shows that the relocation is in good faith for a legitimate purpose and to a location that is reasonable in light of that purpose.'<sup>36</sup> If neither parent exercises custodial responsibility a significant majority of the time, then the court adopts a custody modification approach and must reallocate custodial responsibility based on the best interests of the child.<sup>37</sup>

In some states, cases that involve joint custody are treated differently than cases involving sole custody. For example, New Jersey's relocation standard is viewed as favoring the relocating custodial parent. Custodial parents need show only that the move is proposed in good faith and is not 'inimical' to the child's interests.<sup>38</sup> However, where parents share custody, the New Jersey courts treat the relocation petition as a motion for a change in custody. This motion is decided under the best interests of the child standard, with the burden of proof equally shared by the parents.<sup>39</sup> North Dakota requires custodial parents to prove that relocation is in the best interests of the child. However, where parents have joint custody, courts must first assign primary custody, before making a relocation decision.<sup>40</sup>

## **2.2. The custody modification approach**

Several states use custody modification doctrine to evaluate relocation disputes.<sup>41</sup> A substantial move is generally considered a substantial change in circumstances that allows the court to determine whether there should be a change in custody.<sup>42</sup> Courts using the custody modification approach have resisted efforts to switch the focus to whether to permit the parent to relocate. The Alaska Supreme Court, for example, has admonished its lower courts that they are not to determine whether a parent is permitted to relocate. Rather, as long as the parent has a legitimate reason to relocate, courts must assume that the relocation will occur, and determine what custody arrangement is in the best interests of the child upon relocation.<sup>43</sup>

A custody modification approach may also place the burden of proof on the non-relocating parent. That burden may be heavy, as it is in Kentucky, where the parent seeking modification must show that the child is or will be endangered and that the advantages of a change in custody

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33 *Gruber v. Gruber*, 583 A.2d 434 (Pennsylvania Superior Court 1990).

34 Ala. Code 1975, §30-3-169.4 (2007).

35 Tenn. Code Ann. § 36-6-108(d),(e)(2008).

36 W. Va. Code §48-9-403(d)(1)(2008).

37 W. Va. Code §48-9-403(d)(3)(2008).

38 *Baures v. Lewis*, 770 A.2d 214, 226 (New Jersey 2001).

39 *O'Connor v. O'Connor*, 793 A.2d 810 (New Jersey Superior Court 2002); see also *Lewellyn v. Lewellyn*, 93 S.W.3d 681, 686-87 (Arkansas 2002).

40 *Maynard v. McNett*, 710 N.W.2d 369 (North Dakota 2006); see also *Potter v. Potter*, 119 P.3d 1246, 1249 (Nevada 2005).

41 See, e.g., *Latimer v. Farmer*, 602 S.E.2d 32 (South Carolina 2004).

42 See, e.g., *Rowland v. Kingman*, 629 A.2d 613 (Maine 1993).

43 *Moeller-Prokosch v. Prokosch*, 99 P.3d 531 (Alaska 2004).

outweigh the harm that is likely to be caused by a disruption in the custodial arrangement.<sup>44</sup> Iowa places a lighter burden on the non-relocating parent seeking primary custody to prevent the child from relocating.<sup>45</sup> The non-custodial parent must prove that the move is a substantial change and that he has an ability ‘to minister more effectively to the children’s well-being.’<sup>46</sup> In Kansas, a court should consider all factors in determining whether to modify custody, including the effect of the move on the best interests of the child and other affected parties and the increased costs of the exercise of visitation rights.<sup>47</sup> Wisconsin permits parents to choose between a petition to modify custody and a petition to oppose relocation.<sup>48</sup>

Courts using a custody modification approach join states that use relocation doctrine in treating joint custodial arrangements differently. For example, Vermont has a high threshold for removing custody from a relocating custodial parent. A parent with primary or sole custody will only lose custody if the non-custodial parent can prove that the children’s best interests would be so undermined by the relocation that a transfer of custody is necessary.<sup>49</sup> However, where one parent in a joint custodial arrangement wants to move, the court considers the current custodial arrangement disrupted and allocates sole custody as in the best interests of the child.<sup>50</sup>

### **2.3. Judicial interpretations of children’s best interests**

Courts generally consider a wide range of factors in determining the child’s interests in a relocation dispute. Courts will consider the quality of the relationship with each parent, as well as the child’s relationship with other family and friends in their current and proposed locations. Courts also consider the child’s age and development, and what the likely impact of relocation will be on the child, the child’s preference, and whether the relocation will enhance the quality of life for the child and relocating parent. They also weigh the feasibility of alternative visitation arrangements to maintain the child’s relationship with the non-relocating parent. Courts may order a new visitation and contact schedule if the relocation is permitted, and may also apportion the increased costs to maintain contact between the two parents.<sup>51</sup>

While precise doctrinal standards and burdens of proof vary widely, because courts in relocation cases consider a myriad of factors, they hear fact-intensive presentations by the parties.<sup>52</sup> Courts consider the amount of time the child spends with each parent, and the level of engagement in the child’s activities, schooling and interests each parent has demonstrated. They also consider the extended family network available to the child in each location, and whether the child has a significant relationship with these relatives. Courts are much more reluctant to relocate children away from a community that is home to a supportive and involved extended family. Courts scrutinize the schooling arrangements, as well as participation in other community activities such as sports and religious organizations. If children have special educational needs, they will consider the ability of the schools in both locations to meet those special needs. They also consider whether a working parent will be able to stay home fulltime after relocation, and the economic situation of the family in both settings.<sup>53</sup>

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44 *Fenwick v. Fenwick*, 114 S.W.3d 767 (Kentucky 2003).

45 *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa 2000).

46 *Ibid.*

47 Kan. Stat. §60-1620(c)(2007).

48 Wisc. Stat. §767.481(3)(2007).

49 *Lane v. Schenck*, 614 A.2d 792 (Vermont 1992).

50 *Hoover v. Hoover*, 764 A.2d 1192 (Vermont 2000).

51 See, e.g., Fla. Stat. 61.13001(7)(2008).

52 The fact-intensive nature of presentations in relocation hearings is described in D. Hofstein *et al.*, ‘A Moving Case for Staying Put’, 2006 *Family Advocate* 25, pp. 25-29.

53 *Ibid.*

Crucial to courts' analyses of these many factors relating to children's best interests, however, appears to be an underlying legislative or judicial policy determination favoring either the maintenance of the child's relationship with the non-custodial parent or the view that the child's custodial family takes precedence over the child's relationship with the non-custodial parent.<sup>54</sup> In later sections, this article explores the disputed social science and ideological bases for these differing views.

These varied state approaches have in common an emphasis on the best interests of the child. In many states, the court's only concern is the best interests of the child; the interest of the custodial parent in relocation is legally irrelevant.<sup>55</sup> In other states, even where the effect of the move on the quality of life for the parent as well as the child is a factor, courts may give it little or no attention.<sup>56</sup> In some states, however, the shared focus on the best interests of both the parent and child are given great weight. The Washington Child Relocation Act, for example, shifted judicial analysis from the best interests of the child to a shared focus on the child's and the parent's interests.<sup>57</sup> Some other states take the parent's well-being into account indirectly, by finding the child's interests to be interwoven with the interests of the primary custodial parent.<sup>58</sup> In many states, however, the focus is on the best interests of the child, and that focus often centers on the possible disruption a move would cause to the child's relationship with the non-custodial parent.<sup>59</sup>

#### **2.4. Recommendations of professional bodies concerning relocation**

Professional bodies share with US states the inability to agree on a common doctrinal approach to relocation. Two highly regarded professional legal organizations – the American Law Institute and the American Academy of Matrimonial Lawyers – have proposed methods for states to adopt to deal with relocation disputes. At this writing, the National Conference of Commissioners on Uniform State Laws is considering the adoption of a Model Relocation Statute, but has not yet published its recommendations.

##### *2.4.1. The American Law Institute Principle for Relocation of a Parent*

The American Law Institute (ALI) published *Principles of the Law of Family Dissolution* for the first time in 2002.<sup>60</sup> The ALI Principles deal with a wide range of subjects affected by dissolution, including the allocation of custodial and decision making responsibility for children. The Principles seek to reduce litigation by adopting firm rules that restrain judicial discretion and, it is hoped, decrease incentives for parents to engage in lengthy litigation. They favor relocation by a parent with a clear majority of the parenting time, but are neutral when parents more equally share parenting time.

The ALI Principles require a parent who wants to relocate to provide the other parent with sixty days' notice prior to the relocation. If the other parent opposes relocation, the Principles establish a three-tiered process. Where the relocation significantly impairs the other parent's

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54 *Fohey v. Knickerbocker*, 130 S.W.3d 730 (Missouri Court of Appeals 2004); *Curole v. Curole*, 828 So.2d 1094 (Louisiana 2002) (favoring relationship with non-custodial parent); cf. *Baures v. Lewis*, 770 A.2d 214 (New Jersey 2001) and *Rosenthal v. Maney*, 745 N.E.2d 350 (Massachusetts Court of Appeals 2001) (favoring needs of the custodial family).

55 See, e.g., Ala. Code 1975 §30-3-169.4; *Norris v. Heckerman*, 972 So.2d 1098, 1099 (Florida Court of Appeals 2008).

56 See, e.g., *Speck v. Spadafore*, 895 A.2d 606, 614 (Pennsylvania Superior Court 2004).

57 Wash. Rev. Code § 26.09.520 (2008).

58 These courts have emphasized that the child indirectly benefits from the improvement of the general quality of life for the custodial parent. See, e.g., *In re Marriage of Collingbourne*, 791 N.E.2d 532 (Illinois 2003); *Rosenthal v. Maney*, 745 N.E.2d 350 (Massachusetts Court of Appeals 2001).

59 See, e.g., La. Rev. Stat. §355.13; Vernon's Ann. Missouri Stat. §452.377(9); Wisc. Stat. §767.481(5).

60 American Law Institute, *supra* note 23, p. xv.

exercise of responsibilities in accordance with an agreed upon or court-ordered parenting plan, the court should first try to revise the parenting plan to accommodate the change without changing the proportion of custodial time of either parent. If the circumstances of the relocation make it impossible to maintain the same allocation of custodial time, then the court should decide whether to permit the parent to relocate with the child. A parent who has a clear majority of custodial time is presumed to be permitted to relocate for ‘a valid purpose, in good faith, and to a location that is reasonable in light of that purpose.’ However, if neither parent has a clear majority of the custodial time, the court must modify the parenting plan to reflect the child’s best interests. Whenever a court permits a parent to relocate, the court should minimize the disruption to the child’s relationship with the other parent.<sup>61</sup>

#### *2.4.2. The American Academy of Matrimonial Lawyers Model Relocation Statute*

The American Academy of Matrimonial Lawyers has also proposed an approach to relocation disputes, but its approach differs greatly from the ALI Principles and is far less definitive than the approach adopted by the ALI.<sup>62</sup> The *Model Relocation Statute* requires sixty days’ notice of a change in the principal residence of a child, and permits the non-custodial parent to object to the relocation. However, the members of the Academy were unable to reach agreement on the standard that should be applied to such a dispute, and instead, it provides states various options. For example, with regard to custody modification, the Act states that ‘[a] proposed relocation of a child [may] [may not] [shall] be a factor in considering a change of [custody]. States may choose any of the three options.’<sup>63</sup> The comments state that ‘[i]t is left for the states to debate and decide whether a custody proceeding should be tried in connection with the relocation request.’<sup>64</sup>

Members of the Academy reached agreement on the factors that courts should consider when determining whether to permit relocation, such as the child’s relationship with each parent, whether the relocation would improve the quality of life of the child and the relocating parent, and the effect of relocation on the child’s relationship with the non-moving parent.<sup>65</sup> It could not agree, however, on which party should bear the burden of proof with regard to those factors, or whether the burden of proof should shift from one parent to the other. Thus, the burden of proof is also left to states to determine.<sup>66</sup> The members of the Academy do reach agreement on one interesting factor that has gained little attention by courts. It states that courts should *not* consider whether the parent seeking relocation has declared that he or she will not relocate if relocation of the child is denied. This factor is designed to prevent courts from coercing parents to agree to give up their plans to relocate before they receive a judicial decision.<sup>67</sup>

### **3. The academic literature on relocation disputes**

#### ***3.1. The unresolved social science debate***

As judges seek to determine the best interests of children, they often look to psychologists to conduct evaluations of the family situation or consider the social science literature concerning the effects of relocation after divorce on children. On occasion, courts have placed great reliance

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61 *Ibid.*, pp. 354-356.

62 American Academy of Matrimonial Lawyers, *supra* note 9.

63 *Ibid.*, p. 17.

64 *Ibid.*, pp. 17-18.

65 *Ibid.*, p. 18.

66 *Ibid.*, pp. 20-21.

67 *Ibid.*, p. 20.

on social science findings, using them to determine aspects of the relocation doctrine itself. For example, courts that adopted rules that include consideration of the well-being of the custodial parent relied on social science research that linked children's well-being with that of their custodial parents.<sup>68</sup> Other courts have relied on research that focuses on the importance of the child's relationship with the non-custodial parent to place the burden on the parent who wishes to relocate to demonstrate that the move is in the child's interest.<sup>69</sup> Relocation disputes that reach state supreme courts now may include *amicus curiae* briefs by noted psychologists who have different interpretations of the social science literature.<sup>70</sup>

However, the social science literature supplies no easy answers to the relocation conundrum. The current state of the social science literature makes it difficult to clearly apply its findings to any area of custodial disputes, much less the more specific area of relocation disputes. In fact, only one very limited study directly addresses relocation, and no study compares outcomes for children whose custodial parents are denied permission to relocate with the outcomes for children whose custodial parents are permitted to relocate.<sup>71</sup>

In addition, children's outcomes are likely to be strongly affected by the context in which relocation or geographic stability takes place. Thus, a smooth relocation supported by both parents, in which the parents make efforts to encourage children to be emotionally close to the other parent, is a completely different experience for children than a relocation that is disputed, creates stress and anger in the parents, and forces children to move between two different warring camps. Similarly, growing up with two parents who cooperate and each make sacrifices to remain in close proximity is quite different than being raised in a context in which one parent has been ordered by a court to forego an important employment or remarriage opportunity in order to remain in proximity to the other parent. Nevertheless, the social science literature, despite its conflicting and limited nature, continues to be widely cited in the legal academic literature to support directly conflicting views regarding relocation.<sup>72</sup>

The psychological needs of children whose parents divorce has gained importance in the development of legal rules because of an extensive literature that describes increased rates of various psychological disorders, emotional distress, and negative behaviors in children whose parents divorce. One longitudinal study, conducted over twenty years, identified continuing distress and negative behaviors in approximately 20% to 25% of adults whose parents had divorced, more than twice the 10% rate found for adults who had grown up with parents who remained married.<sup>73</sup> The negative behaviors included depression, and impulsive, irresponsible,

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68 *In re Marriage of Goldman*, 725 N.W. 2d 747, 754 (Minnesota Court of Appeals 2007); *Baures v. Lewis*, 770 A.2d 214, 222-223 (New Jersey 2001); *In re Marriage of Burgess*, 913 P.2d 473, 483 (California 1996); *Hollandsworth v. Knyzewski*, 109 S.W. 3d 653, 660 (Arkansas 2003); *Scott v. Scott*, 578 S.E.2d 876, 880 (Georgia 2003); *In re Marriage of Pape*, 989 P.2d 1120, 1128 (Washington 1999).

69 *In re Marriage of Ciesluk*, 100 P. 3d 527, 531 (Colorado Court of Appeals 2004), reversed at 113 P. 3d 527 (Colorado 2005); *Mize v. Mize*, 621 So. 2d 417, 422-423 (Florida 1993); *Scott v. Scott*, 578 S.E.2d 876, 883 (Georgia 2003)(dissent).

70 When the California Supreme Court recently heard the case of *In re LaMusga*, 88 P.3d 81 (California 2004), *amicus* briefs were filed for the mother by Judith Wallerstein, law professors including Carol S. Bruch, and the California Women's Law Center. *Amicus* briefs for the father were filed by Richard Warshak and Leslie Ellen Shear, <http://www.thelizlibrary.org/lamusga/>

71 K. Waldron, 'A Review of Social Science Research on Post Divorce Relocation', 2005 *Journal of American Academy of Matrimonial Lawyers*, pp. 342-343.

72 Professor Carol Bruch believes that the current state of social science demonstrates that 'good parenting by the custodial parent is the most effective protection for a child's post-divorce well-being.' She claims that authors on the other side of the debate do not provide scientific basis for their statements and '[o]ften they are directly contrary to the credible scientific evidence. At best their reasoning constitutes wishful thinking. At worst, it relies on distortion.' C. Bruch, 'Sound Research or Wishful Thinking in Child Custody Cases? Lessons From Relocation Law', 2006 *Family Law Quarterly*, p. 297. On the other side of the debate, Robert Oliphant argues that there is little support for the view 'that what is good for the custodial parent is also good for the child.' He discusses research that describes children as thriving when they are able to maintain relationships with both parents. R. Oliphant, 'Relocation Custody Disputes: A Binuclear Family-Centered Three-Stage Solution', 2005 *Northern Illinois University Law Review*, p. 401.

73 E. Hetherington et al., *For Better or For Worse: Divorce Reconsidered*, 2002, p. 228.

and antisocial behavior.<sup>74</sup> These adults also demonstrated difficulty at work, and in romantic relationships.<sup>75</sup> Some studies demonstrate that many of these indicators of risk are present before divorce.<sup>76</sup> There is widespread agreement that children in families that experience divorce are subject to greater risks, and academics across viewpoints share an interest in designing legal rules to minimize those risks. Noted researchers split, however, on how best to ameliorate those risks in the context of divorce.

One set of literature draws upon research that focuses on the post-divorce role of the primary caregiver in the overall well-being of children. Led most publicly by Dr. Judith Wallerstein, a psychologist who followed a small group of children of divorce over a twenty-five year period, these researchers assert that the social science evidence identifies a healthy relationship between the primary caretaker and the child as the most important factor affecting the well-being of children after divorce.<sup>77</sup> They note that the deterioration in the parenting skills of custodial parents immediately following separation or divorce significantly impairs the well-being of their children.<sup>78</sup> The ability of custodial parents to recover quickly and assume an authoritative parenting role with their children is closely related to improving the well-being of their children.<sup>79</sup>

These researchers also argue that the available social science research does not support the view that the relationship with the non-custodial parent is a key factor in improving children's well-being.<sup>80</sup> To the more limited extent that the child's relationship with the non-custodial parent improves outcomes, they assert that it is the quality, not quantity, of time that is correlated to children's well-being.<sup>81</sup> They also highlight the detrimental effects of parental conflict on children.<sup>82</sup>

The conclusion Dr. Wallerstein and others have drawn from the close link between the custodial parent's parenting and children's well-being, the more limited value of increased time with non-custodial parents, and the detrimental effect of conflict, is that legal rules in the context of relocation should favor the well-being of the custodial parent.<sup>83</sup> This includes the custodial parent's interest in relocating without a renewal of legal discord concerning relocation. Dr. Wallerstein has not, however, applied her findings to cases in which the parents equally share custodial responsibility.

In stark contrast to this view are those who emphasize the significance of the child's relationship with the non-custodial parent.<sup>84</sup> The researchers who highlight this relationship do not dispute the importance of parenting by the custodial parent or the reduction of conflict between the parties. They argue that courts and policymakers have undervalued the child's relationship with a non-custodial parent, and they highlight the important benefits that a positive

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74 *Ibid.*

75 *Ibid.*

76 P. Amato *et al.*, 'Children's Adjustment to Divorce: Theories, Hypotheses and Empirical Support', 1993 *Journal of Marriage and the Family*, p. 31.

77 *Ibid.*, p. 126; J. Wallerstein *et al.*, 'To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children After Divorce', 1996 *Family Law Quarterly*, p. 311.

78 Hetherington *et al.*, *supra* note 73, pp. 130-133.

79 *Ibid.*, pp. 126-130.

80 *Ibid.*, pp. 133-134.

81 *Ibid.*, p. 558. (finding that the 'frequency of contact may be less important than other relationship dimensions, such as the strength of the emotional tie between children and fathers.');

Hetherington *et al.*, *supra* note 73, pp. 133-134; P. Amato *et al.*, 'Nonresident Fathers and Children's Well-Being: A Meta-Analysis', 1999 *Journal of Marriage & the Family*, pp. 557-573.

82 Amato *et al.*, *supra* note 76, p. 31.

83 Wallerstein *et al.*, *supra* note 77, p. 318.

84 R. Warshak, 'Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited', 2000 *Family Law Quarterly*, p. 84; J. Kelly *et al.*, 'Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children', 2000 *Family and Conciliation Courts Review*, p. 298.

relationship with the non-custodial parent brings to children.<sup>85</sup> Dr. Richard Warshak asserts that studies find that regular visitation with fathers improves children's well-being. He also cites studies that demonstrate that fathers who see their children frequently are more likely to provide economic support for their children.<sup>86</sup>

It is readily apparent that even if there were agreement on the basic premise of the importance of the non-custodial father-child relationship, relocation is likely to occur in most post-divorce families anyway. One large, longitudinal study found that 75 miles seems to be the distance where 'paternal inconvenience overcomes paternal guilt' and visitation declines, and that by the time the children are age 15, the average distance between children and their non-custodial parents was 400 miles.<sup>87</sup>

The only research study to attempt to answer directly questions regarding the effect of relocation of children of divorced parents had ambiguous findings.<sup>88</sup> The researchers surveyed a large number of college students whose parents had divorced. A strong majority (61%) had experienced relocation of more than one hour by one parent, almost evenly split between relocations by mothers and fathers. On most measured criteria, students who had relocated with their mothers showed no measurable differences from students whose parents had not relocated. These measures included personal and emotional adjustment, general life satisfaction, substance abuse, and levels of hostility. Statistically significant disparities did exist on some measures, including amount of parental financial support for college, inner turmoil and distress from the divorce, and global health.<sup>89</sup> The study did not measure the circumstances leading to the moves, the quality of children's relationships with both parents prior to the moves, or levels of pre-move conflict between the parents, so it is difficult to tell whether the disparities were caused by the relocations or were affected by other factors, including factors such as continuing parental conflict, which may have caused the relocation.<sup>90</sup>

Given the lack of evidence of causal connection between relocation and harm to children, it is difficult to know what conclusions to reach from these results. The highly disputed interpretations of various studies concerning which factors best assist children in successfully surviving divorce does little to assist policymakers to craft the legal rules that govern these disputes. Even where such conclusions have been proposed, they largely focus on which parent will bear the burden of proof regarding the best interests of children involved in these disputes.<sup>91</sup> Both sides of this debate admit, however, that their interpretive approach provides little clear guidance to judges facing individual families with specific circumstances.<sup>92</sup> Nor, as at least one family court judge has pointed out, does the research enable judges, even with the use of psychological

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85 L. Trinder *et al.*, 'Measuring Up? The Relationship Between Correlates of Children's Adjustment and Both Family Law and Policy in England', 2005 *Louisiana Law Review*, pp. 1516-1517.

86 Warshak, *supra* note 84, pp. 93-94.

87 Hetherington *et al.*, *supra* note 73, p. 134.

88 S. Braver *et al.*, 'Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations', 2003 *Journal of Family Psychology*, pp. 206-219.

89 *Ibid.*, pp. 212-213.

90 *Ibid.*, pp. 214-215.

91 Warshak, *supra* note 84, p. 111 ('If legislatures and courts believe that most children do best when their parents remain in close geographical proximity, this might result in presumptions, standards, tests, and burdens that discourage relocation.'); Oliphant, *supra* note 72, pp. 401-402 ('courts should give "greater weight to the child's separate interests" when deciding a relocation dispute.');

92 Waldron, *supra* note 71, p. 342; Warshak, *supra* note 84, pp. 110-111 ('Neither research, nor this article, could possibly cover all the factors that might affect any individual child's adjustment to relocation. Children's adjustment after divorce has much to do with their own personalities and coping skills.').

experts, to predict accurately which decision will ultimately best further children's development in individual cases.<sup>93</sup>

However, the extent to which relocation was a pervasive part of the lives of the college students who participated in the Arizona State relocation study, affecting close to two-thirds of the students whose parents had divorced, may indicate a need for policymakers to consider not simply what legal doctrine should apply to disputes in court concerning relocation, which are most likely a very small percentage of the total relocations. Rather, it may indicate a need to provide support to divorcing families as they make the various transitions that occur during and after divorce, including the apparently common experience of relocation by either the custodial or non-custodial parent. Relocation doctrine itself may be of little relevance to most post-divorce and post-separation families and children.

### **3.2. *The ideology of co-parenting and its effect on relocation disputes***

Ideological changes concerning co-parenting may have a more profound impact on relocation doctrine than the social science literature. While the social science dispute continues unabated, many countries are currently experiencing a transcendence of the ideology of co-parenting after divorce and decreasing ideological support for the independence of the custodial family.<sup>94</sup> Professor Robert Oliphant has lauded the 'binuclear' family as the appropriate model for post-dissolution parenting.<sup>95</sup> 'A binuclear family is defined as a large, interconnected family, with one household headed by the ex-wife and the other household headed by the ex-husband, with the child being a member of both.'<sup>96</sup> He finds this term in a recent Georgia Supreme Court opinion, in which the concurring judge identified the benefits for children of this shared parenting approach.<sup>97</sup> Professor Oliphant contrasts the binuclear family concept with the view that he believes dominated in the 1960s and 1970s, a view he describes as the 'new family.' Under this view, courts would defer to the 'new' custodial family as the primary source of support for children. Professor Oliphant argues that dramatic shifts in the parenting role of fathers and the work involvement of mothers support the binuclear view of the post-dissolution family. The shifting focus towards post-dissolution co-parenting may account for the increase in the number of states that either prioritize or permit joint physical custody of children.<sup>98</sup> It is also reflected in the array of parenting books that encourage cooperative parenting after divorce.<sup>99</sup>

The ideology of co-parenting has also affected relocation disputes. As discussed in Section 2, recent legislative and doctrinal changes have largely emphasized the importance of non-custodial parents in the lives of their children by increasing the barriers to relocation.<sup>100</sup> In addition, increases in joint custody will likely increase the success of petitions to prevent relocation. Parents who have joint physical custody are able to more clearly demonstrate the benefits of their relationship to the child to prevent relocation.<sup>101</sup> While in most cases this distinction arises in the court's discussion of the facts of an individual case, at least two states

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93 W. Duggan, 'Rock-Paper-Scissors: Playing the Odds With the Law of Child Relocation', 2007 *Family Court Review*, p. 193; J. Bowermaster, 'Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings', 2002 *Duquesne Law Review*, pp. 295-301.

94 Glennon, *supra* note 4; P. Parkinson, 'Family Law and the Indissolubility of Parenthood', 2006 *Family Law Quarterly* pp. 242-247.

95 Oliphant, *supra* note 72, pp. 363-402.

96 *Ibid.*, p. 365.

97 *Bodne v. Bodne*, 588 S.E.2d 728,730(Ga. 2003)(Sears, J., concurring).

98 J. Murphy, 'Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement and Fatherless Children', 2005 *Notre Dame Law Review* p. 337, n. 59 (collecting statutes concerning joint custody).

99 Glennon, *supra* note 4, p. 114, n. 48.

100 See Section 2, *supra*.

101 T. Glennon, 'Mobility and the Post-Divorce Family: Resolution of Relocation Disputes in the U.S.', in K. Boele-Woelki (ed.), *Common Core and Better Law in European Family Law*, 2005, pp. 193-215.

have codified the distinction between situations in which one parent is the majority time parent and situations where the time is shared substantially equally.<sup>102</sup> Increases in post-dissolution co-parenting, now fostered in many ways, will significantly change the course of relocation disputes.

### **3.3. Proposals to emphasize parental cooperation**

Articles have proposed adapting relocation doctrine to encourage parents to settle their disputes privately rather than seeking judicial intervention. Professors Lucy McGough and Robert Oliphant advocate the development of mandatory measures to encourage parents to cooperate to resolve the relocation issue privately before relocation disputes reach a judicial hearing in order to encourage the parties.<sup>103</sup> They note that open conflict between divorced or separated parents is a powerful stressor on children, and numerous studies have demonstrated that hostility between the parents may be the greatest risk factor for children of separation and divorce.<sup>104</sup> They hope that their proposed procedures will reduce this harmful parental conflict.

Professor McGough would require parents who want to relocate to not only provide written notice prior to relocation, but to include also a proposal for revised visitation arrangements to mitigate the potential damage of the relocation to their children's relationship with non-moving parents.<sup>105</sup> She would also require parents to attend a mandatory education program that addresses parenting strategies, including strategies to reshape the non-moving parent's relationship with the child after a relocation.<sup>106</sup>

Professor Oliphant would instead begin the process with a mandatory parenting plan meeting between the parents. This meeting would occur after notice of a proposed relocation is given, and the parents are to make reasonable efforts to resolve any dispute regarding the relocation.<sup>107</sup>

Most important, both authors would require parents to attempt mediation of the relocation dispute before reaching court. At least 33 states now require parents to attempt mediation prior to a judicial hearing on child custody disputes, and almost all others make mediation services available to assist parents to achieve resolution of their disputes. In mediation, the parents meet with an impartial third party who serves to facilitate an agreement between the parents. Although the authors realize that mediation will not prevent all relocation disputes from reaching the courts, they believe that it can resolve some of these disputes, and that the reduction in parental conflict and individual and judicial resources is well worth a requirement that parents attempt this strategy.<sup>108</sup>

### **3.4. Conflicting constitutional rights of parents**

Both the right to travel freely and the constitutional rights of parents to the care and control their children have been raised in the context of relocation disputes. The exercise of judicial power to prohibit relocation by custodial parents arguably affects significant rights protected by the US Constitution. The Constitution has been interpreted to include a fundamental right to travel among the states as a liberty interest under the Due Process Clause of the Fourteenth Amendment. Travel is not the only asserted constitutional right at stake, however, as non-custodial

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102 See Section 2.1, *supra*.

103 L. McGough, 'Starting Over: The Heuristics of Family Relocation Decision Making, 2003 *St. John's Law Review*, pp. 291-343; Oliphant, *supra* note 72, pp. 395-397.

104 McGough, *supra* note 103, pp. 323-325 (citing social science studies).

105 *Ibid.*, pp. 334-335.

106 *Ibid.*, pp. 336-337.

107 Oliphant, *supra* note 72, pp. 395-397.

108 McGough, *supra* note 103, pp. 337-341; Oliphant, *supra* note 72, pp. 397-399.

parents have argued for recognition of a constitutionally protected liberty interest in the continuing care and control of their children. This liberty interest may apply to the interests of both custodial and non-custodial parents. To date few courts have addressed parents' interest in the care and control of their children in the context of relocation disputes.

The right to travel is clearly rooted in US constitutional law. In *Shapiro v. Thompson*, the US Supreme Court stated:

‘This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.’<sup>109</sup>

The Court did not identify the specific constitutional provision that supported this right, but found it to be a fundamental right. The Court found that legislation that significantly impaired the right to travel must serve a compelling state interest.<sup>110</sup>

Equally established is the constitutional right of parents to the care and control of their children. The US Supreme Court has stated that ‘it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children,’ describing it as ‘perhaps the oldest of the fundamental liberty interests recognized by this Court.’<sup>111</sup> However, courts have clearly held that while both parents have equal and fundamental rights at stake in custody determinations, it is constitutional for courts to make those decisions based on the best interests of the children.<sup>112</sup> They have thus rejected the argument that the parental rights of non-custodial parents require them to receive equal custodial time with their children.<sup>113</sup> Some courts faced with ‘equal custody’ claims find that the rights of the parents cancel each other out.<sup>114</sup> Professor Margaret Brinig has viewed the state as having a compelling interest in the welfare of the children whose custody is disputed, which justifies judicial decision making in the best interest of the children.<sup>115</sup> Professor David Meyer has taken a different tack, asserting that state intervention is appropriate because each parent’s rights are qualified by the competing interests of the other family members.<sup>116</sup>

Professor Arthur LaFrance, who himself married a woman who was unable to relocate to live with him after their marriage, argues strenuously against judicial interference with the rights of custodial parents to relocate. He asserts that courts may not interfere with the custodial parent’s right to travel and other important interests, such as the right to remarry and establish a home with a new spouse, despite the interests of the non-custodial parent.<sup>117</sup> He believes that such interference is warranted only if the move endangers the child. Judicial intervention should be focused on ensuring reasonable visitation with the non-custodial parent.<sup>118</sup> The Wyoming Supreme Court has adopted this approach. In *Watt v. Watt*, the Wyoming Supreme Court stated:

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109 *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

110 *Ibid.* at 634. The Supreme Court reiterated the fundamental nature of the right to travel in *Saenz v. Roe*, 526 U.S. 489 (1999).

111 *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

112 M. Brinig, ‘Does Parental Autonomy Require Equal Custody at Divorce?’, 2005 *Louisiana Law Review*, p. 1358.

113 See, e.g., *Arnold v. Arnold*, 679 N.W.2d 296 (Wisconsin Court of Appeals 2004), review denied, 679 N.W.2d 547 (Wisconsin 2004), certiorari denied, 543 U.S. 873 (2004).

114 D. Meyer, ‘The Constitutional Rights of Non-Custodial Parents’, 2006 *Hofstra Law Review*, pp.1478-1479.

115 Brinig, *supra* note 112.

116 Meyer, *supra* note 114, p. 1466.

117 A. LaFrance, ‘Child Custody and Relocation: A Constitutional Perspective’, 1995 *University of Louisville Journal of Family Law*, pp. 1-81.

118 *Ibid.*

‘The right of travel enjoyed by a citizen carries with it the right of a custodial parent to have the children move with that parent. This right is not to be denied, impaired, or disparaged unless clear evidence before the court demonstrates another substantial and material change of circumstance and establishes the detrimental effect of the move upon the children.’<sup>119</sup>

Although other state courts are familiar with this approach, they have declined to follow it. One court has found that the deprivation of the right to travel is justified by the state’s compelling interest in the best interests of the child.<sup>120</sup> Several courts have agreed that the right to travel is ‘chilled’ by the denial of the right of a ‘majority time parent’ to relocate with her children.<sup>121</sup> Other courts have identified the parents as having competing rights to travel and to continue to parent their child, and that the children have interests in their own well-being. Despite their recognition of the custodial parent’s right to travel, however, these courts have determined that as long as the burden of proof regarding the best interests of the child concerning relocation is equal, the constitutional rights of all parties are protected.<sup>122</sup>

It is not clear that state court approaches to relocation adequately protect a custodial parent’s right to travel. It is insufficient to claim that it is not the parent’s right to travel that is at stake, but the parent’s right to bring her children. This assumes that a court has determined that even if the parent moves, it would be in the children’s interests to shift custody to the non-custodial parent. This is not always the case, however. In many cases, courts have ordered custodial parents to remain in their present area of residence, subject to a threat of loss of custody if they move. In some cases, they have threatened to transfer custody upon relocation without first determining that the children would be better served by living with the non-custodial parent rather than living with the custodial parent in the new setting.<sup>123</sup> This threat, which may be described as relocation blackmail, may violate the custodial parent’s right to travel and right to the custody, care and control of the child, as well as children’s best interests.

Another important factor in addressing the constitutional right of the custodial parent to travel is the uneven manner in which travel restrictions are imposed. In all jurisdictions, non-custodial parents are free to leave the jurisdiction and relocate wherever they wish, and they routinely do so.<sup>124</sup> They may initiate court proceedings to modify their visitation time to fit their new geographic circumstances, but no court has considered itself authorized to prevent the relocation itself. Thus, while a court will prevent a custodial parent from relocating in order to better protect the child’s relationship with the non-custodial parent, it will not prevent relocation by a non-custodial parent in order to better protect that same relationship.<sup>125</sup> The uneven nature of these travel restrictions brings into question whether the custodial parents’ right to travel is being unduly restricted, and whether these restrictions unfairly burden women, who most often have primary custody and are subject to such restraints.

Professor Thomas Oldham notes that while non-custodial parents are not prevented from relocating, they do face limits on their autonomy related to child support. Courts are generally

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119 *Watt v. Watt*, 971 P.2d 608, 615-616 (Wyoming 1999).

120 *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minnesota Court of Appeals, 2000).

121 See, e.g., *In re Marriage of Ciesluk*, 113 P.3d 135, 142 (Colorado 2005).

122 *Ibid.* See also *Jaramillo v. Jaramillo*, 823 P.2d 299 (New Mexico 1991); *Fredman v. Fredman*, 960 So.2d 52 (Florida Court of Appeals, 2007); *Baxendale v. Raich*, 878 N.E.2d 1252 (Indiana 2008).

123 *Braver et al.*, *supra* note 88 (suggesting that courts consider ordering relocation if a custodial parent insists on relocating in order to discourage such relocations).

124 *Ibid.*

125 M. Weiner, ‘Inertia and Inequality: Reconceptualizing Disputes over Relocation’, 2007 *University of California Davis Law Review*, p. 42.

reluctant to approve a reduction in child support payments based on voluntary changes in employment or withdrawal from employment.<sup>126</sup> It is not clear, however, whether income imputation for purposes of child support work to restrict the non-custodial parent's autonomy as deeply as relocation restrictions, which may prevent a parent from accepting a new job or living with a spouse. As this discussion demonstrates, important and conflicting constitutional rights arise in relocation disputes; they demand more careful analysis by US courts.

### **3.5. Relocation and domestic violence**

States have increasingly moved in the direction of explicitly requiring custodial parents to provide notice prior to relocation.<sup>127</sup> They also now mandate that if the other parent objects, relocation may not take place until after a hearing and a determination on the merits of the relocation. Professor Janet Bowermaster notes the dilemma relocation restrictions impose on mothers who are victims of domestic violence:

‘Custodial parents attempting to escape abusive situations may actually be prevented from moving to another state, city, or even school district by state laws restricting the removal of minor children without the noncustodial parent’s permission. These laws, which were designed to protect noncustodial parents’ access to children after divorce or separation, contain no generally recognized exception for those custodial parents who are fleeing from domestic violence. Violation of these removal procedures can result in custody being transferred to the violent parent.’<sup>128</sup>

Thus, relocation statutes, which are intended to preserve the child's relationship with the non-custodial parent, can be used by perpetrators of domestic violence to continue to abuse and control their spouse or ex-spouse.<sup>129</sup> While one hopes that perpetrators of domestic violence are unlikely to be successful at a hearing, it can take a long time to get a hearing and final decision on relocation. Professor Bowermaster provides numerous other examples of relocation disputes in which domestic violence was a factor, and she describes in detail one case in which the process of receiving permission to relocate took two and one-half years, during which time the mother was subjected to further abuse, harassment, and financial ruin due to her inability to leave her home safely.<sup>130</sup>

Clearly, relocation statutes need to be explicitly linked to laws protecting victims of domestic violence to ensure that victims may flee their attackers in a timely and safe manner. Victims of domestic violence should have a quick administrative or judicial process by which they can gain permission to withhold their new contact information from the other parent and relocate to safety.

### **3.6. Reconfiguring relocation disputes**

Scholars have recommended that relocation disputes be doctrinally altered away from a narrow focus on whether to permit the custodial parent to relocate with her children. These authors have

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126 T. Oldham, ‘Limitations Imposed by Family Law on a Separated Parent’s Ability to Make Significant Life Decisions: A Comparison of Relocation and Income Imputation’, 2001 *Duke Journal of Gender Law and Policy*, pp. 333-341.

127 See Section 2, *supra*.

128 J. Bowermaster, ‘Relocation Custody Disputes Involving Domestic Violence’, 1998 *Kansas Law Review* p. 433.

129 The Hague Convention on the Civil Aspects of International Child Abduction raises similar concerns at a transnational level. Professor Merle Weiner has argued that the Convention needs to be strengthened to prevent its misuse to force victims to return to the community of the perpetrator. M. Weiner, ‘Strengthening Article 20’, 2004 *University of San Francisco Law Review*, pp. 701-744.

130 Bowermaster, *supra* note 128, pp. 434-435.

challenged courts' failure to consider whether the objecting parent would be able to relocate to the new location, and whether custodial parents should have an economic remedy if they face a significant economic loss because of the denial of permission to relocate.

Professor Merle Weiner has challenged the binary nature of relocation disputes, which focus only on whether the custodial parent may or may not relocate. As part of their analysis, she believes that courts should also consider the non-custodial parent's potential mobility.<sup>131</sup> She argues that the failure to consider whether the non-custodial parent could relocate undermines children's best interests by ignoring what may be the best solution in particular cases. She explains that the failure to consider the possible relocation of the non-custodial parent also 'rests on outdated gendered assumptions and institutionalizes gender discrimination (...) [and] perpetuates stereotypes, fosters expectations of accommodation that are gendered, and sustains different degrees of mobility for custodial and noncustodial parents.'<sup>132</sup> She highlights the message that her proposal to reconfigure the relocation dispute would send to all divorced parents: that both parents have the responsibility to act in their child's best interests while respecting the long term interests of each parent.

In a recent article, I propose another factor that would also shift courts away from the yes/no nature of relocation disputes. I argue that the restrictions on the geographic mobility of custodial parents, together with imposition of the economic 'clean break' theory of divorce, have led to custodial parents, mostly women, facing significant economic hardship as a result of refusals by courts to permit relocations.<sup>133</sup> My review of all relocation disputes for the five-year period ending July 1, 2006 revealed that many of the reasons that custodial parents sought to relocate had significant economic dimensions. Twenty-eight percent of custodial parents wanted to relocate to improve or maintain their own employment or their spouse's employment. Fifteen percent requested relocation for remarriage, and 11% wanted to relocate to live near family who would provide economic support or in-kind assistance. Another 21% sought to relocate for a combination of reasons that included employment, remarriage, or further education.<sup>134</sup>

These economic benefits could be significant, making the difference between a comfortable life style and ongoing financial difficulties. Since, overall, custodial parents received permission to relocate in only 49% of the cases reviewed that actually reached a final decision, custodial parents who want to relocate face great uncertainty and lengthy delays if the other parent refuses to consent to their relocation. The uncertainty and delays can prevent custodial parents from pursuing relocation or lead to withdrawn opportunities when potential spouses and employers decide they can no longer wait for a decision. Thus, when courts deny custodial parents permission to relocate, courts should have the explicit authority to grant an income-sharing economic remedy to the parent who is denied permission to relocate, thereby sharing the economic burdens of maintaining the child's close contact with both parents.

#### **4. Conclusion**

States within the US have failed to achieve any agreement over the fundamental issues involved in relocation disputes. They have adopted a wide range of approaches to this issue, underscoring the deep disputes within the social science literature and conflicting ideologies regarding post-

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131 Weiner, *supra* note 125, pp. 1-44.

132 *Ibid.*, p. 2.

133 Glennon, *supra* note 4.

134 *Ibid.*, p. 125.

divorce families. Most states have yet to fully grapple with the important constitutional rights of parents involved in these disputes, or the safety needs of victims of domestic violence. Scholars have proposed several important reforms, including the addition of mandatory alternative dispute resolution, deprivileging of the current location of the family, and the consideration of an economic remedy when thwarted relocation imposes significant economic losses on a custodial parent. Policymakers in this area need to carefully consider these issues to develop a legal doctrine more attuned to the needs of all participants in these disputes. They also need to recognize the pervasive nature of relocation after divorce and consider educational and other strategies to ensure that relocation is not a significant risk for children affected by parental separation and divorce.