A Toss of the Dice...The Gamble with Post-Divorce Relocation Laws

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A TOSS OF THE DICE . . . THE GAMBLE WITH POST-DIVORCE RELOCATION LAWS

In recent years, the increased mobility of American society\(^1\) has generated a remarkable change in the law governing interstate child custody determinations.\(^2\) Traditional state control of family law\(^3\) has bowed to the need for uniformity\(^4\) induced by "the practical demands of a mobile society in today's shrinking world . . . ." State legislatures, concerned over loss of jurisdiction in child custody de-
terminations, first responded by adopting the Uniform Child Custody Jurisdiction Act. This state effort was supplemented by the Parental Kidnapping Prevention Act and the Parent Locator Service, federal answers to the inconsistent results caused by contradictory state child custody decisions. Such national legislation sought to eliminate forum shopping by parents seeking to avoid unfavorable child custody determinations.

6. See 9 U.L.A. 115-16 (1988) (listing all fifty states and the District of Columbia as jurisdictions in which the act has been adopted).


POST-DIVORCE RELOCATION LAWS

With respect to the laws governing post-divorce relocation of custodial parents, this Note argues in favor of a further nationwide movement towards uniformity\(^{11}\) through federal legislation to ease the fears over loss of jurisdiction by the states in interstate child custody conflicts.\(^{19}\) Presently, post-divorce relocation laws vary widely from state to state and govern situations which have been aggravated by the increased mobility of American society.\(^{10}\)

I. AN INTRODUCTION TO THE POST-DIVORCE RELOCATION CONTROVERSY

Any judicial determination involving the relocation of a custodial parent\(^{14}\) engenders conflict between the interests of the parents,


11. See infra notes 20-21 (discussing divergent state holdings).

12. See infra note 23 and accompanying text (noting the states' fear concerning the loss of control over custody and visitation determinations).

13. Unifying legislation, like the Uniform Child Custody Jurisdiction Act, 9 U.L.A. 115 (1988), and the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1982), should be extended into the relocation arena because:

[i]n the past, removal was commonly denied because of the potential loss of jurisdiction over custody issues. This concern has largely been met by adoption . . . of the Uniform Child Custody Jurisdiction Act [and the] [f]urther protection of the rights of both parents . . . afforded by the Parental Kidnapping Prevention Act of 1980 [which authorized the Parent Locator Service].

Auge v. Auge, 334 N.W.2d 393, 399 (Minn. 1983) (citations omitted). See generally Coombs, supra note 4 (outlining the effects of child custody legislation in recent years); Tye, supra note 4 (noting that adoption of the Uniform Child Custody Jurisdiction Act has led to increased interstate cooperation and avoidance of jurisdictional disputes); Recent Decisions, 30 St. John's L. Rev. 94, 98-102 (1955) (reviewing pre-Uniform Child Custody Jurisdiction Act and pre-Parental Kidnapping Prevention Act fears about permitting relocation); Comment, supra note 3 (addressing problems of enforcement in a general overview of the Parental Kidnapping Prevention Act).

14. Relocation can be contested during both the original divorce and custody proceeding, and as a separate issue at a later date. See infra note 36 (outlining the situations in which conflicts over relocation arise). This Note presupposes a situation in which either parent is capable of custodianship of the minor child or children involved. It also assumes that both parents are acting in good faith and that the custodian's desire to move is not intended to undermine the other parent's visitation privileges. See infra note 39 (noting good faith reasons for desiring relocation). This Note presumes that the noncustodial parent objects to the move for fear of a dwindling relationship with the child. See infra note 40 (noting that such fear is a good faith objection to relocation).

This Note uses the terms "relocation" and "removal" interchangeably to indicate the resettling of a custodial parent and child in a jurisdiction other than that which granted the original custody decree.
the child, and the state. The parents wish to protect their freedom of travel and their parental rights, while the state is concerned with loss of jurisdiction and protection of the child's welfare.

The rules governing post-divorce relocation of custodial parents vary significantly from state to state. At one side of the controversy is a presumption in favor of the custodial parent's desire to relocate, while the other extreme endorses a presumption favoring the non-custodial parent's objection to relocation. Due to the multiplicity of approaches, each state has its own set of rules and guidelines for determining whether a relocation will be permitted.

15. See Auge v. Auge, 334 N.W.2d 393, 397-99 (Minn. 1983) (outlining the issues and concerns involved in relocation determinations).

16. The Supreme Court has long recognized and protected the travel privilege, which is inferred from various sections of the Constitution. See L. Tribe, American Constitutional Law § 16-8, at 1455-57 (2d ed. 1988) (noting that the sources for constitutional protection of freedom of travel include the Commerce Clause, the Privileges and Immunities Clause of Article IV and the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment); cf. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) (declaring unconstitutional a Nevada statute imposing a tax on all persons exiting state by common carrier); The Passenger Cases, 48 U.S. (7 How.) 283 (1849) (invalidating state laws requiring ship masters to pay a tax on disembarking passengers).

17. Arizona has held that "the term 'parental rights' includes the right to care, custody, and control by the parent . . ." Anguis v. Superior Court, 6 Ariz. App. 68, 71, 429 P.2d 702, 705 (1967). These rights include the "[p]hysical possession of the child which, in the case of a custodial parent includes the day-to-day care and companionship of the child. In the case of a non-custodial parent, possession is tantamount to the right to visitation." L.A.M. v. State, 547 P.2d 827, 832-33 n.13 (Alaska 1976).

18. See supra note 13 (discussing state concerns over loss of jurisdiction).

19. See infra note 47 and accompanying text (noting that state courts consider the best interests of the child as a paramount concern).

20. See, e.g., Pons v. Phillips, 406 So. 2d 932, 935 (Ala. Civ. App. 1981) (holding that in the absence of a court order to the contrary, a custodial parent has a right to relocate elsewhere); Forslund v. Forslund, 225 Cal. App. 2d 476, 494, 37 Cal. Rptr. 489, 500 (1964) (perceiving the right to relocate as part of the custodial parent's right to choose a residence for him or herself and the minor child involved); Auge v. Auge, 334 N.W.2d 393, 397 (Minn. 1983) (acknowledging a presumption that removal be permitted "subject to the noncustodial parent's ability to establish that removal is not in the best interests of the child."); Madgett v. Madgett, 360 N.W.2d 411, 413 (Minn. Ct. App. 1985) (stating that "[t]here is a presumption that a request by the custodial parent to remove the child to another state is in the best interests of the child."); see also infra notes 99-121 and accompanying text (discussing New Jersey, Minnesota, Alabama, and California relocation cases, statutes and standards involving relocation).

21. See, e.g., In re Marriage of Eckert, 119 Ill. 2d 316, 325-26, 518 N.E.2d 1041, 1044 (1988) (construing the Illinois relocation statute to require the custodial parent to bear the burden of proof that the move will not undermine the child's best interests); Quirin v. Quirin, 50 Ill. App. 3d 785, 788, 365 N.E.2d 226, 228 (1977) (holding that "[t]he burden of proof is on the party seeking judicial approval of the proposed removal" to establish that the move is in the children's best interest); Hornbeck v. Hornbeck, 702 P.2d 42, 45 (Okla. 1985) (holding that a relocation which effectively deprives the noncustodial parent of visitation is a change
ity of contradictory state laws, parents who divorce are virtually rolling the dice, staking their extended futures in the relocation law game of chance.22

State relocation statutes previously restricted relocation because the states feared a loss of control over custody and visitation determinations23 and wanted to protect the child’s best interests through parens patriae jurisdiction.24 These concerns no longer affect relocation determinations. Today, state interests are secured by the availability of alternative visitation schedules25 and the protections pro-

of circumstances and supports a modification of custody); McAlister v. Patterson, 278 S.C. 481, 482, 299 S.E.2d 322, 323 (S.C. 1982) (recognizing a presumption against relocation); see also In re Marriage of Meier, 286 Or. 437, 445-46, 595 P.2d 474, 478 (1979) (holding that it is contrary to public policy to allow removal, except if it is in the best interests of the child); infra notes 58-67 and accompanying text (discussing the balancing test set forth in In re Marriage of Eckert, 119 Ill. 2d 316, 518 N.E.2d 1041 (1988)); infra note 57 (reviewing South Carolina restrictions on relocation).

22. This extended future is the length of time remaining until the youngest child reaches the age of consent. Cf. N.J. STAT. ANN. § 9:2-2 (West 1976) (providing that “[children] . . . shall not be removed out of [the] jurisdiction against their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents . . . .”).

23. See generally Recent Decisions, supra note 13, at 98-102 (reviewing pre-Uniform Child Custody Jurisdiction Act and pre-Parental Kidnapping Prevention Act fears about permitting relocation).


25. The different types of visitation schedules include split weeks, alternating days or months and school time versus vacation time. See Woolley, Shared Parenting Arrangements, in JOINT CUSTODY AND SHARED PARENTING 16 (J. Folberg ed. 1984) (reviewing possible shared parenthood arrangements). As the New Jersey Supreme Court recognized:

A realistic and reasonable visitation schedule is one that will provide an adequate basis for preserving and fostering a child’s relationship with the noncustodial parent if the removal is allowed. . . . [T]he court should not insist that the advantages of the move be sacrificed and the opportunity for a better and more comfortable life style . . . be forfeited solely to maintain weekly visitation . . . where reasonable alternative visitation is available and where the advantages of the move are substantial.

Cooper v. Cooper, 99 N.J. 42, 57-58, 491 A.2d 606, 614 (1984), overruled on other grounds by, Holder v. Polansky, 111 N.J. 344, 544 A.2d 852 (1988) (citations omitted). It has been further noted in New Jersey that:

It is at least arguable, and the literature does not suggest otherwise, that the alternative of uninterrupted visits of a week or more in duration several times a year, where the father [in this case the noncustodial parent] is in constant and exclusive parental contact with the children and has to plan and provide for them on a daily
vided by uniform national legislation. These factors combine to permit a state to adjust present standards without fear of harm to the child or loss of jurisdiction. Therefore, the "accident" of where a divorce takes place should affect neither the strength nor the importance of either parent’s individual rights.

Further legislation is necessary to standardize the requirements governing the legal relocation of parent and child after a divorce. A new uniform state law, or additional federal action could balance the conflicting interests of the parents and the states, while reconciling the differing state requirements, retaining traditional state court jurisdiction over child custody matters, and insuring the child's well-being. This Note explores the current divergence between the states, suggests a compromise between the different jurisdictional standards, and proposes a model for unifying legislation.

II. THE QUANDARY OF POST-DIVORCE RELOCATION

Post-divorce relocation becomes a problem if a custodial parent wants to leave the jurisdiction granting the original custody decree,

basis, may well serve the paternal relationship better than the typical weekly visit which involves little if any exercise of real paternal responsibility.


26. See supra notes 6-10 and accompanying text.

27. For example, if a family lived in several states during the course of the marriage, and only "accidentally" winds up in a state with a restrictive removal law at the time of divorce, that law will control custodial parent’s ability to relocate for the remaining minority of the children. See supra note 21 (noting states with presumptions against the custodial parent’s relocation). Alternatively, if the state with jurisdiction over the divorce has a less restrictive removal standard, the noncustodial parent, no matter how involved in the child's life, will have a very difficult task preventing relocation by the custodial parent. See supra note 20 (noting States which have presumptions in favor of the custodial parent's relocation).

28. See infra text accompanying notes 145-50 (outlining suggested legislation).

29. See infra notes 124-39 and accompanying text (discussing the relative advantages and disadvantages of uniform state law and federal legislation).

30. See infra notes 135-39 and accompanying text (outlining the conflicting interests of parents and states); supra notes 20-21 (discussing the differences between state relocation laws).

31. See supra note 3 (tracing state court jurisdiction of child custody matters).

32. See infra notes 47-48 and accompanying text (noting that the child's best interest is of paramount concern to courts).

33. See infra notes 54-121 and accompanying text.

34. See infra notes 122-44 and accompanying text.

35. See infra notes 145-50 and accompanying text.
over the objection of the noncustodial parent. In this situation there are three leading actors: the father, the mother and the minor child. One parent may be awarded physical custody, while the other is granted visitation rights. There are a number of good faith reasons

36. Questions about relocation generally arise in two contexts: as part of the original divorce proceeding, see Blake v. Blake, 207 Conn. 217, 541 A.2d 1201 (1988) (invoking relocation as permitted under the final judgment dissolving the marriage of the parties); Broomfield v. Broomfield, 283 So. 2d 839 (La. Ct. App. 1973) (granting custody and permission to mother to remove to another state in judgment of divorce), or after a divorce decree has been finalized. See Cole v. Cole, 530 So. 2d 467 (Fla. Dist. Ct. App. 1988) (finding that relocation warranted modification of the custody determination); In re Marriage of Eckert, 119 Ill. 2d 316, 518 N.E.2d 1041 (1988) (considering mother's desire to move as a modification of custody decision); Madgett v. Madgett, 360 N.W.2d 411, 413 (Minn. Ct. App. 1985) (considering father's objection to custodial mother's move as a request for modification of custody decision). South Dakota's leading relocation case, however, decided the question of removal in the context of an unwed mother, subsequently married to another man and over the objection of the natural father. See In re Ehl, 303 N.W.2d 808 (S.D. 1981).

This Note deals with these two situations interchangeably, since most of the underlying issues and determinations are similar. The actual procedural posture might, however, lead to a different interpretation of a standard, especially when the desire to relocate after the divorce decree is finalized is considered a custody modification. See infra notes 82, 95 (noting the effects of differences in procedural posture on relocation decision-making).

This Note does not deal with (1) questions of forum arising under the Uniform Child Custody Jurisdiction Act, 9 U.L.A. 115 (1988); (2) questions of removal without notice to the noncustodial parent arising under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1982); or (3) questions of removal that do not involve a breakup of the nuclear family.

37. By simple and practical definition, "[p]hysical custody refers to which parent will be granted the 'routine daily care and control and the residence of the child.'" Raines, Joint Custody and the Right to Travel: Legal and Psychological Implications, 24 J. Fam. L. 625, 626 (1985-86) (citation omitted); see infra notes 93-94 (delineating the differences between physical and legal custody). In this Note "custodial parent" refers to the parent with physical custody.

The mother is the parent most often granted physical custody. See Bureau of the Census, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1988, at 43, chart no. 56 (108th ed. 1987) (noting that in 1987 there were 1,451,000 mother-child subfamilies, compared to only 123,000 father-child subfamilies in the United States); cf. Holder v. Polansky, 111 N.J. 344, 349, 544 A.2d 852, 854-55 (1988). In Holder, the New Jersey Supreme Court noted that:

[formerly, custody of children of tender years was generally awarded to the mother. With increasing frequency, however, mothers and fathers now share the responsibility for the care and custody of their children and the support of the family. Consequently, courts have begun to make more frequent awards of custody to fathers and, in appropriate cases, to make joint custody awards. Nonetheless, in many instances, the mother still receives custody of the children, and the father is awarded visitation rights.

Id. (emphasis added).

38. See id. at 349, 544 A.2d at 854. In Holder, the New Jersey Supreme Court noted that "[w]hen children are involved [in a divorce], one parent receives physical or residential custody and the other parent receives visitation rights. Alternatively, the parents may enter into an arrangement for joint custody." Id.; cf. Ebbert v. Ebbert, 744 P.2d 1019, 1022 (Utah Ct. App. 1987) (stating that "[t]he visitation schedule should be realistic and reasonable and
why a custodial parent might want to remove the child from the state with jurisdiction over custody arrangements,\textsuperscript{39} despite the objection of the noncustodial parent.\textsuperscript{40} Traditionally, the noncustodial parent retains the freedom to move around, without regard to the location of the child or the custodial parent.\textsuperscript{41} As noted in New Jersey, "a noncustodial parent is perfectly free to remove himself from this jurisdiction despite the continued residency here of his children in order to seek opportunities for a better or different lifestyle for himself."\textsuperscript{42} Custodial parents, on the other hand, who are primarily responsible for the child after a divorce,\textsuperscript{43} have to restrict their own movements to enable the noncustodial parents to exercise parental rights.\textsuperscript{44}

In relocation cases, every member of the broken family unit has a separate interest to be considered.\textsuperscript{45} Since children are the innocent

provide an adequate basis for preserving and fostering the child's relationship with the noncustodial parent." (citing Cooper v. Cooper, 99 N.J. 42, 57, 491 A.2d 606, 614 (1984)).

39. Good faith reasons for a relocation may include remarriage, better employment, and return to hometown and family. See Weiss v. Weiss, 52 N.Y.2d 170, 172, 175-76, 418 N.E.2d 377, 378, 380, 436 N.Y.S.2d 862, 863, 865 (1981) (noting that the mother's plans to relocate to "make a new life" were made in good faith). Bad faith, such as a desire to wreak vengeance upon a despised spouse, alters this situation entirely. See Auge v. Auge, 334 N.W.2d 393, 398 (Minn. 1983) (stating that removal should not be allowed for frivolous or spiteful reasons); Weiss, 52 N.Y.2d at 176, 418 N.E.2d at 380, 436 N.Y.S.2d at 865 (finding a mother's plans in good faith when there was "no suggestion that she was motivated by a desire to put the child out of the reach of the father or to jeopardize their relationship ....") (citations omitted). See generally R. Gardner, Child Custody Litigation: A Guide for Parents and Mental Health Professionals 247-48 (1986) (identifying specious reasons used by parents to thwart the desires of the ex-spouse).


41. See Auge, 334 N.W.2d at 398; In re Marriage of Cole, 224 Mont. 207, 212-13, 729 P.2d 1276, 1280 (1986); D'onofrio, 144 N.J. Super. at 207, 365 A.2d at 30.

42. D'onofrio, 144 N.J. Super. at 207, 365 A.2d at 30.

43. Since the child lives with the custodial parent, he or she has the major responsibility for day to day living arrangements. See Auge, 334 N.W.2d at 397 (stating that "the custodial parent is allowed wide discretion in determining the educational, health, and religious needs of the child ...."); see also Casida v. Casida, 659 P.2d 56, 57 (Colo. App. 1982) (recognizing the custodial parent's "great latitude in carrying out the custodial responsibilities of providing a primary home for the minor children of the parties.").

44. See Cooper v. Cooper, 99 N.J. 42, 56, 491 A.2d 606, 613 (1984) (recognizing that "[t]he custodial parent's freedom to move is qualified . . . by the competing interest of the noncustodial parent."); see also Fournie, Post-Divorce Visitation: A Study in the Deprivation of Rights, 27 De Paul L. Rev. 113 (1977) (exploring the rights of the parties involved in post-divorce situations).

victims in any divorce proceeding, the best interests of the child are of paramount concern to the courts. In fact, best interests is the

46. See Bernick v. Bernick, 31 Colo. App. 485, 505 P.2d 14, 15 (1972) (noting that "[i]n recent years there has been an increasing awareness that, in divorce proceedings, the children are themselves the most disadvantaged parties.").

47. In Yannas, the Supreme Judicial Court of Massachusetts formulated a definition for determining a child’s best interests:

An evaluation of the best interests of the child requires attention to whether the quality of the child's life may be improved by the change (including any improvement flowing from an improvement in the quality of the custodial parent's life), the possible adverse effect of the elimination or curtailment of the child's association with the noncustodial parent, and the extent to which moving or not moving will affect the emotional, physical, or developmental needs of the child.


standard by which their legal rights are protected. The "best interests doctrine," in the context of custodial parent relocation, varies in meaning from state to state. A state with a permissive relocation standard will require the noncustodial parent to prove that the move will undermine the child's best interests, while a state that restricts relocation will compel the custodial parent to prove that the intended move will improve the child's quality of life.

III. THE MULTIPLECTY OF STATE RELOCATION LAWS

Whether created by statutory authority or judicial decision, the state laws controlling post-divorce relocation vary widely, with a trend across the country towards decreasing removal constraints.


49. See Yannas, 395 Mass. at 712-13, 481 N.E.2d at 1158-59 (finding that safeguarding a child's best interests protects his/her constitutional and other rights).

50. See supra note 47 (defining best interests in terms of relocation decisions).

51. The divergence in state court opinions over the meaning of "best interest" has led to conflicts in interpretation when these courts quote each other in the various cases. Compare Weiss, 52 N.Y.2d at 175, 418 N.E.2d at 380, 436 N.Y.S.2d at 865 (requiring "exceptional circumstances" to allow relocation, with special emphasis on the visitation rights of the non-custodial parent); with Bloss 147 Ariz. at 525-26, 711 P.2d at 664-65 (reinterpreting Weiss, without special emphasis on any particular conflicting interest, to apply a significantly less restrictive standard for relocation).

52. See, e.g., Holder 111 N.J. at 344, 544 A.2d at 852 (requiring the noncustodial parent to prove that relocation will damage the child's relationship with that parent); see also infra notes 57-67 and accompanying text.

53. See, e.g., In re Marriage of Eckert, 119 Ill. 2d 316, 325, 518 N.E.2d 1041, 1044 (1988) (implying that relocation will only be allowed if the move benefits the child); see also infra notes 57-67 and accompanying text (discussing the various factors weighed by the Eckert court).

54. See supra notes 20-21 (outlining the various state laws).

55. Compare Eckert, 119 Ill. 2d at 326, 518 N.E.2d at 1044 (recognizing a strong presumption against relocation); with Auge v. Auge, 334 N.W.2d 393, 395 (Minn. 1983) (recognizing a presumption that removal is in the best interests of the child).

56. See, e.g., Eckert, 119 Ill. 2d at 326, 518 N.E.2d at 1045 (stating that a "reading of case law . . . indicate[s] a trend which would permit removal unless rather strong negative circumstances indicated against it."). The line of New Jersey relocation decisions is indicative of this trend. See generally infra notes 71, 99-110 and accompanying text (discussing the New Jersey cases).

Under the least restrictive view, the right to relocate and decide upon a residence for the
Although no jurisdiction forbids relocation outright, some states apply a very restrictive standard that places the burden of proving that the move will not undermine the child's best interests squarely on the custodial parent, thereby creating a heavy presumption in favor of the noncustodial parent's objection. This type of standard, as defined in *In re Marriage of Eckert,* implies that the custodial parent...
must demonstrate that a move will affirmatively benefit the child, in order to prove that relocation is in the child's best interests.\(^5\) This is considerably more difficult than showing that relocation is not inconsistent with the child's well-being.\(^6\) The Eckert standard uses a balancing test,\(^6\) which includes such factors as (1) whether the general quality of life for both the custodial parent and child would be enhanced,\(^6\) (2) whether both parents' motives for and against relocation were appropriate,\(^3\) (3) whether a reasonable visitation schedule could be arranged,\(^4\) and (4) whether the noncustodial parent had exercised previous visitation rights.\(^6\) The various elements are then weighted so as to almost preclude relocation.\(^6\) In Eckert, this was accomplished by placing the most emphasis on what the state supreme court termed the "policy" of the relocation statute—to secure maximum involvement of both parents in the child's upbringing,

relocation statute, as amended. See infra note 67 (setting forth the Illinois relocation statute). In Eckert, the Illinois Supreme Court specifically pointed out that despite the lower court's recognition of a trend across the country permitting removal in the absence of strong negative evidence against it, any decision reflecting that trend was directly contrary to the express language of the statute. Eckert, 119 Ill. 2d at 327, 518 N.E.2d at 1045. Reversing the lower court decision, the Illinois Supreme Court denied the mother's request for relocation. Id.

59. See id. at 325, 518 N.E.2d at 1045 (setting forth factors to be considered when determining a child's best interests).

60. This was the standard followed in Illinois before the burden of proof clause, emphasized infra note 67, was added to the Illinois relocation statute in 1982. See In re Marriage of Burgham, 86 Ill. App. 3d 341, 408 N.E.2d 37 (1980); see also infra notes 73-98 and accompanying text (reviewing other jurisdictions applying a standard similar to Burgham). The addition of this clause specifically placed the burden of proof on the custodial parent. See Eckert, 119 Ill. 2d at 325, 518 N.E.2d at 1044.

Burgham, decided just before the amendment, allowed a custodial parent to make a *prima facie* case for removal by demonstrating that the parent wanted to move for a sensible reason which included a superficial showing that the move was consistent with the child's best interests. 86 Ill. App. 3d 341, 408 N.E.2d 37 (1980); cf. Eckert, 119 Ill. 2d at 325-26, 518 N.E. 2d at 1044-45 (discussing the tie between Burgham, decided in 1980, and the statute, which became effective on January 1, 1982). The Burgham holding is consistent with the law in South Dakota today. See infra notes 73-82 and accompanying text.

61. A balancing test is the most common method used by the different states for determining best interests. See, e.g., infra text accompanying note 67 (listing the elements considered by the Illinois Eckert decision); infra note 71 (outlining the D'onofrio balancing test and those states referring to this test); infra note 105 (listing the factors balanced in Iowa under In re Marriage of Stickle, 408 N.W.2d 778, 780 (Iowa Ct. App. 1987); supra note 47 (noting the elements of the Yannas balancing test).

62. See Eckert, 119 Ill. 2d at 326-27, 518 N.E.2d at 1045.

63. See id. at 327, 518 N.E.2d at 1045.

64. See id.

65. See id.

66. See infra note 70 (describing the weight of different elements in the Illinois and New York balancing tests).
both during and after a divorce.67

New York, without specific statutory guidance,68 created the "exceptional circumstances test" in Weiss v. Weiss.69 This is virtually the same as the Illinois test in terms of burden of proof,70 implying that a move will only be allowed when there is a "dramatic change in circumstances."71 The custodial parent's good faith alone

67. See Eckert 119 Ill. 2d at 330-31, 518 N.E.2d at 1046 (stating that "the purpose of the [Illinois Marriage and Dissolution of Marriage] Act is to 'secure the maximum involvement and cooperation of both parents regarding the physical, mental, moral and emotional well-being of the children during and after the litigation.'" (citations omitted)). The Illinois relocation statute provides:

(a) The court may grant leave, before or after judgment, to any party having custody of any minor child or children to remove such child or children from Illinois whenever such approval is in the best interests of such child or children. The burden of proving that such removal is in the best interests of such child or children is on the party seeking the removal. When such removal is permitted, the court may require the party removing such child or children from Illinois to give reasonable security guaranteeing the return of such children.


In Eckert, after thoroughly questioning whether the move would benefit the child and the mother's motives for the move, the court found that (1) she had insufficient reason for the move, (2) she did not adequately dispel the evidence of bad faith concerning her desire for the move, and (3) she did not met her burden of proof concerning the best interests of her child. 119 Ill. 2d at 331-33, 518 N.E.2d at 1046-47. The court implied that her burden of proof was not met because she could not show that the move would actually benefit the child. See id. In addition, the court noted the father's exemplary parenting and outstanding relationship with the child which weighed heavily against the mother's claim. Id. at 333, 518 N.E.2d at 1047. The court also found a move to Arizona was unnecessary to enhance the mother's career. Id. at 331-32, 518 N.E.2d at 1046. Absent bad faith and insufficient reason for relocation, however, the strict standard formulated in this case may be loosened in the future.


69. Id. The Massachusetts Supreme Judicial Court used the phrase to describe the New York relocation standard in general. See Yannas v. Frondistou-Yannas, 395 Mass. 704, 710, 481 N.E.2d 1153, 1157 (1985).

70. The New York balancing test, which led to the same strict standard as followed in Illinois, gives the greatest weight to the noncustodial parent's interest in visitation. See Weiss, 52 N.Y.2d at 175, 178, 418 N.E.2d at 380, 436 N.Y.S.2d at 865. Although at first glance New York's test may seem more relaxed than Illinois', the New York Court of Appeals did not have to weigh the effects of bad faith in their calculations. See id. The New York court denied relocation through virtually the same reasoning, but the New York rule may actually be tougher, because there is no bad faith factor with which to distinguish the Weiss decision in later cases. See supra note 67 (noting that bad faith may have had an effect on the court's relocation decision in Eckert).

71. Weiss, 52 N.Y.2d at 175-76, 418 N.E.2d at 382, 436 N.Y.S.2d at 866. The dra-
is not enough to allow relocation.\textsuperscript{72}

The "good reason test," as formulated by the South Dakota Supreme Court in \textit{In re Ehlen},\textsuperscript{73} is a slight modification of the New York standard. Removal is allowed if the custodial parent has a good

motic change might include a career improvement, remarriage, or exceptional health or educational needs of the custodial parent or child. \textit{See id.} This interpretation was recently followed in Pecorello v. Snodgrass, 142 A.D.2d 920, 530 N.Y.S.2d 350 (1988). In \textit{Pecorello}, however, the custodial mother was allowed to relocate with the child because she had remarried and her new husband had been involuntarily transferred. \textit{See id.} at 920, 530 N.Y.S.2d at 350. The court placed special emphasis upon the involuntary nature of the transfer, and did not require a specific improvement for the child. \textit{See id.}

Similarly, the Florida District Court of Appeals recently held that a custodial parent may seek modification of a final judgment restricting relocation by "a showing of substantial or material change of circumstances and [a showing] that the requested modification would be in the best interests of the children." \textit{Cole v. Cole}, 530 So. 2d 467, 468 (Fla. Dist. Ct. App. 1988); \textit{see also Delapa, To Leave or Not To Leave (The Jurisdiction)—That Is the Question}, FLA. B.J., Nov. 1986, at 39, 41 (advocating concern for the happiness of the custodial parent). \textit{But see McIntyre v. McIntyre}, 452 So. 2d 14 (Fla. Dist. Ct. App. 1984) (holding that there is no restriction on residence change unless contained in the final divorce decree); \textit{Note, Shared Parental Responsibility and Residence Restrictions in Florida}, 38 U. FLA. L. REV. 117, 120 (1986) (authored by Paul S. Quinn, Jr.) (proposing "that courts remove residential restrictions only if the advantages to the child, the residential parent, and the new family unit outweigh the harm to the child and the nonresidential parent."). The \textit{Cole} court looked to the factors of the \textit{D'onofrio} balancing test, as related in \textit{Cooper v. Cooper}, 99 N.J. 42, 56-57, 491 A.2d 606, 613 (1984). The four prongs of the \textit{D'onofrio} test are:

\begin{enumerate}
\item [1] \text{the court should consider the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children.}
\item [2] \text{It must evaluate the integrity of the motives of the custodial parent in seeking the move in order to determine whether the removal is inspired primarily by the desire to defeat or frustrate visitation by the noncustodial parent, and whether the custodial parent is likely to comply with substitute visitation orders when she is no longer subject to the jurisdiction of the courts of this State.}
\item [3] \text{It must likewise take into account the integrity of the noncustodial parent's motives in resisting the removal and consider the extent to which, if at all, the opposition is intended to secure a financial advantage in respect of continuing support obligations.}
\item [4] \text{Finally, the court must be satisfied that there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parental relationship with the noncustodial parent if removal is allowed.}
\end{enumerate}


\textit{72. See Eckert}, 119 Ill. 2d at 325, 518 N.E.2d at 1044; \textit{Weiss}, 52 N.Y.2d at 176-77, 418 N.E.2d at 380-81, 436 N.Y.S.2d at 865-66.

\textit{73. 303 N.W.2d 808, 810 (S.D. 1981). South Dakota relocation law is supplied by statute: "[a] parent entitled to the custody of a child has the right to change his residence, subject to the power of the circuit court to restrain a removal which would prejudice the rights or welfare of the child." S.D. CODIFIED LAWS ANN. § 25-5-13 (1984); see infra note 76 and accompanying text (discussing the South Dakota Supreme Court's interpretation of this statute).}
reason for living in another state and the move is consistent with the
best interests of the child. The request to move is considered a
modification of the original custody decree, and requires the custo-
dial parent, who wishes to relocate, to seek a modification of custo-
dial rights and to demonstrate a good reason for the move. This is
accomplished when the parent proves, by a preponderance of the evi-
dence, that there has been a "substantial and material change in
circumstances" and that the "welfare and best interests of the

74. See Ehlen, 303 N.W.2d at 810. A version of the "good reason" test has also been
formulated by the Nebraska Supreme Court in Gerber v. Gerber, 225 Neb. 611, 407 N.W.2d
497 (1987). Nebraska has held that:

[b]efore a court will permit removal of a child from the jurisdiction, generally, a
custodial parent must establish that such removal is in the best interests of the child
and must demonstrate that departure from the jurisdiction is the reasonably neces-
sary result of the custodial parent's occupation, a factually supported and reasona-
ble expectation of improvement in the career or occupation of the custodial parent,
or required by the custodial parent's remarriage.

Id. at 619, 407 N.W.2d at 503.

Arizona, which does not have a specific relocation statute, applies a similarly weighted
standard, without the requirement of a specific "good reason." See Bloss v. Bloss, 147 Ariz.
524, 711 P.2d 663 (Cl. App. 1985). The custodial parent's good faith, however, is an implied
requirement, and has virtually the same effect as the "good reason" requirement. See id.; see
also infra note 82 and accompanying text (discussing the Arizona standard under Bloss).

Compare Ehlen, 303 N.W.2d at 810 (requiring a specific "good reason" for relocation) with
Bloss, 147 Ariz. at 526, 711 P.2d at 665 (substituting an implied requirement of good faith for
the custodial parent's "good reason").

75. See Ehlen, 303 N.W.2d at 810. For a discussion of custody modification standards,
as affected by the behavior of a custodial parent, see generally Chambers, Rethinking the
Substantive Rules for Custody Disputes in Divorce, 83 Mich. L. Rev. 477 (1984); Charlow,
supra note 47, at 267; Fournie, supra note 45, at 113; Henszey, supra note 47, at 213; see also
Comment, Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-
(authoring by Nancy B. Shernow); Comment, Best Interests Revisited: In Search of Guide-
lines, 1987 Utah L. Rev. 651 (authoring by Laura B. Dupaix).

76. Ehlen, 303 N.W.2d at 810. On its face, however, the South Dakota statute indicates
that the objecting party, in petitioning the court to exercise its restraint over relocation, is the
party seeking modification of custody. See S.D. CODIFIED LAWS ANN. § 25-5-13 (1984); supra
note 73 (setting forth the South Dakota statute). In Ehlen, however, the custodial parent initi-
ated the action seeking permission to relocate the children and modification of the custody
arrangement. Ehlen, 303 N.W.2d at 810; infra notes 87-96 and accompanying text (describing
the Ehlen decision, and the wording of the South Dakota statute). Ehlen involved children of
an unwed couple, who had split up. 303 N.W.2d at 809. The court, allowing the mother to
relocate the children with the other man she subsequently married recognized the "stabiliza-
tion of the mother's life" that her new situation provided. See id. at 809-10.

77. This test for "good reason" is actually a restatement from an earlier custody modifi-
cation decision, not a custodial parent removal decision. See Engels v. Engels, 297 N.W.2d
489, 491 (S.D. 1980) (citing Masek v. Masek, 90 S.D. 1, 237 N.W.2d 432 (1976)).

78. Ehlen, 303 N.W.2d at 810.
child require the modification being sought.\textsuperscript{79} Although a balancing test similar to the “exceptional circumstances” test\textsuperscript{80} is used, the “good reason” test makes it easier to establish a \textit{prima facie} case for removal.\textsuperscript{81} In the “good reason” test, the standard of proof is less stringent, and the objection of the noncustodial parent is not given an increased emphasis.\textsuperscript{82}

The “real advantage” test, as followed in Massachusetts under \textit{Yannas v. Frondistou-Yannas},\textsuperscript{83} is next in the trend towards relaxing relocation standards.\textsuperscript{84} This standard requires that the move result in a “real advantage”\textsuperscript{85} to the custodial parent which is not inconsistent

\begin{itemize}
\item \textsuperscript{79} Id.
\item \textsuperscript{80} See supra notes 68-72 and accompanying text (describing the “exceptional circumstances” test).
\item \textsuperscript{81} Compare Ehlen, 303 N.W.2d at 810 (requiring the parent to have a good reason for the move not inconsistent with the child’s best interests) with Weiss, 52 N.Y.2d at 176-77, 418 N.E.2d at 380-81, 436 N.Y.S.2d at 865-66 (requiring exceptional circumstances to allow a removal that affects visitation). See generally supra notes 68-72 and accompanying text (discussing the Weiss “exceptional circumstances” test).
\item \textsuperscript{82} See Ehlen, 303 N.W.2d at 810; accord Bloss v. Bloss, 147 Ariz. 524, 711 P.2d 663 (Ct. App. 1985). Arizona, without a specific relocation statute, recognizes that relocation is a modification of visitation, and must be judged by a balancing test that includes the best interests of all parties, emphasizing those of the child. Id. at 525-26, 711 P.2d at 664-65. The court, however, describes its test as a “balance between the right to travel and parental rights.” Id. at 525, 711 P.2d at 664. Although citing the New York Weiss standard, Arizona has actually created a truer “balancing” test because there is no extra emphasis on any one element. See id.; see also supra note 80 and accompanying text (noting the New York exceptional circumstances test); Seessel v. Seessel, 748 S.W.2d 422, 424 (Tenn. 1988) (requiring a balance to determine a child’s best interests without implying added weight on any single element). The procedural posture in Bloss, however, makes it difficult to apply to other situations, because the thrust of the decision involved the propriety of the father’s action in petitioning the court to enjoin the mother from leaving the jurisdiction. Bloss, 147 Ariz. at 524-26, 711 P.2d at 663-64. He claimed that the relocation was a \textit{de facto} custody modification. Id. The decision stated that his action was appropriate under the circumstances of the case, and the trial court should have held a hearing to decide whether to restrict removal. Id. at 526, 711 P.2d at 665. The decision implied that the custodial parent should bear the burden of persuasion. See id. at 526-71, 711 P.2d at 664-65.
\item \textsuperscript{83} 395 Mass. 704, 481 N.E.2d 1153 (1985). This phrase was used by the Massachusetts Supreme Judicial Court to describe the test formulated by the New Jersey courts. See Cooper v. Cooper, 99 N.J. 42, 56, 491 A.2d 606, 618 (1984); D’onofrio v. D’onofrio, 144 N.J. Super. 200, 206, 365 A.2d 27, 30, aff’d per curiam 144 N.J. Super. 352, 365 A.2d 716 (1976); see also supra note 47 (noting the elements of the Yannas balancing test); supra note 71 (listing the requirements of the D’onofrio balancing test).
\item \textsuperscript{84} See supra note 56 and accompanying text (discussing the trend in relocation cases).
\item \textsuperscript{85} Yannas, 395 Mass. at 711-12, 481 N.E.2d at 1158. The Supreme Judicial Court has held:

In this process, the first consideration is whether there is a good reason for the move, a “real advantage.” If the custodial parent establishes a good, sincere reason for wanting to remove to another jurisdiction, none of the relevant factors [of a balancing test] becomes controlling in deciding the best interests of the child, but
\end{itemize}
with the child's best interests. As a threshold requirement, the custodial parent must come forward with a good faith reason for the proposed relocation. At that point the burden of proof shifts to the noncustodial parent to prove that the harm to visitation privileges outweighs any advantage gained by the relocation. Although equal emphasis is placed on each element of the balancing test, since the

rather they must be considered collectively.

Id.

The "real advantage" standard formulated in the Massachusetts Yannas case and the New Jersey Cooper case differ in detail and implementation. See Yannas, 395 Mass. at 710-11, 481 N.E.2d at 1157-58; Cooper, 99 N.J. at 53-55, 491 A.2d. at 612. However, in both cases "the real advantage test is grounded on the 'realization that after a divorce a child's subsequent relationship with both parents can never be the same as before the divorce . . . [and] that the child's quality of life and style of life are provided by the custodial parent.'" Yannas, 395 Mass. at 710, 481 N.E.2d at 1157 (quoting Cooper, 99 N.J. at 53, 491 A.2d, at 612). The Massachusetts Supreme Judicial Court interprets the cause requirement in its removal statute, see infra note 87, to indicate that the removal must be in the best interests of the child. See Yannas, 395 Mass. at 711, 481 N.E.2d at 1158 (citing Rubin v. Rubin, 370 Mass. 857, 346 N.E.2d 919 (1976); Hale v. Hale, 12 Mass. App. Ct. 812, 429 N.E.2d 340 (1981)). Therefore, the central issue in a relocation case is a determination of what the "best interests" actually are. See Yannas, 395 Mass. at 711, 481 N.E.2d at 1158; see also infra note 87 (setting forth the Massachusetts relocation statute).

In Michigan, under the Bielawski decision, "real advantage" applies to both the parent and child, although the court implies that a good reason equals a real advantage. See Bielawski v. Bielawski, 137 Mich. App. 587, 591-94 358 N.W.2d 383, 385-86 (1984). The court recognized that the child's gain can be derivative from the improved quality of life of the custodial parent. See id. at 591, 358 N.W.2d at 385-386. The custodial parent must petition the court, but the burden of proof borne by the custodial parent is very low and a pro-removal presumption is reinforced by the ready availability of alternative visitation schedules. Id. Bielawski also held that "a motion for removal does not involve a custody determination," id., and adopted the D'onofrio balancing test to determine whether removal should be allowed. Id.; see supra note 71 (listing the elements of the D'onofrio balancing test).

86. Yannas, 395 Mass. at 711-12, 481 N.E.2d at 1158. The Massachusetts Supreme Judicial Court based its standard for removal on interpretation of the state relocation legislation. See id. The statute provides: "A minor child of divorced parents . . . over whose custody and maintenance a probate court has jurisdiction shall not . . . be removed out of this commonwealth without . . . the consent of both parents, unless the court upon cause shown otherwise orders." Mass. GEN. LAWS ANN. ch. 208, § 30 (West 1987).

88. See Yannas, 395 Mass. at 711-12, 481 N.E.2d at 1158. The advantages to the custodial parent and the child, weighed against the harm to visitation are the major components of the Massachusetts balancing test. See supra note 85 (noting the elements of the Yannas balancing test). These elements are basically the same as those used in the New Jersey D'onofrio balancing test. See supra note 71 and accompanying text (relating the elements of the D'onofrio balancing test). A similar test is also followed in Iowa. See In re Marriage of Stickle, 408 N.W.2d 778, 780 (Iowa Ct. App. 1987); see also infra note 105 (describing the elements of the Stickle balancing test).

89. See Yannas, 395 Mass. at 711-12, 481 N.E.2d at 1158, in which the court stated that:

none of the relevant factors becomes controlling in deciding the best interests of the child, but rather they must be considered collectively. Every person, parent and
custodial parent no longer bears the entire burden of proof,\textsuperscript{\text{90}} the presumption has begun to favor removal.\textsuperscript{\text{91}} The Massachusetts court also implied that any resulting adjustment to the noncustodial parent’s visitation rights is not a modification of the custody decree.\textsuperscript{\text{92}} The original custody determination is only amended by changing the person originally granted physical\textsuperscript{\text{93}} or legal\textsuperscript{\text{94}} custody.\textsuperscript{\text{95}} In making this distinction between physical and legal custody,\textsuperscript{\text{96}} the \textit{Yannas} child has an interest to be considered. The judicial safeguard\textsuperscript{\text{ing}} of [individual] interests lies in careful and clear fact-finding and \textit{not} in imposing heightened burdens of proof or in inequitably identifying constitutional rights in favor of one person against another. \textit{Id.} (emphasis added).

\textsuperscript{\text{90}} \textit{See id.} at 711-12, 481 N.E.2d at 1158 (instituting a general balancing test after the custodial parent has come forward with evidence of a "real advantage"—the equivalent of a good, sincere reason for wanting the move for her or himself).

\textsuperscript{\text{91}} \textit{See Yannas}, 395 Mass. at 710, 481 N.E.2d at 1158 (easing the custodial parent’s burden of proof by construing a standard less restrictive than that practiced in New York); \textit{see also} Bloss v. Bloss, 147 Ariz. 524, 711 P.2d 663 (Ct. App. 1985) (construing the Arizona standard for relocation by reinterpreting and relaxing the New York rule). Mentioned in connection with the “good reason test”, the \textit{Bloss} decision could also be interpreted to apply the burden of proof to the respective adversaries similar to the “real advantage” test. \textit{Id.; see supra} note 82 and accompanying text. This is a more relaxed view, and the way in which the Arizona Court of Appeals stresses the constitutional right to travel of the custodial parent lends credence to this interpretation. C\textit{f. Bloss}, 147 Ariz. at 524, 711 P.2d at 663.

\textsuperscript{\text{92}} \textit{See Yannas}, 395 Mass. at 706, 481 N.E.2d at 1155.

\textsuperscript{\text{93}} Physical custody is defined as “physical possession of the minor children.” \textit{Id.} In \textit{Yannas}, physical custody was granted to the mother. \textit{Id.}

\textsuperscript{\text{94}} Legal custody is defined as “a continued mutual responsibility and involvement by both parents in decisions regarding the child’s welfare in matters of education, medical care, emotion, moral and religious development.” \textit{Id.} at 709, 481 N.E.2d at 1156 (using the statutory language of MASS. GEN. LAWS ANN. ch. 208, § 31 (West 1987)). The court in \textit{Yannas} granted both parents joint legal custody. \textit{Id.} at 708, 481 N.E.2d at 1156. \textit{See generally} Raines, \textit{supra} note 56, at 626-27 (arguing that removal should be restricted to promote joint custody cooperation between parents).

\textsuperscript{\text{95}} \textit{See Yannas}, 395 Mass. at 706, 481 N.E.2d at 1155. The procedural posture of this case may bear on the court’s interpretation. The father was appealing the initial divorce judgment, which included authorization for the mother to relocate to Greece with the children. \textit{Id.}

In the same procedural posture, the Connecticut Supreme Court in \textit{Blake} v. \textit{Blake}, 207 Conn. 217, 541 A.2d 1201 (1988), distinguished all cases that dealt with post-divorce decree relocation, and held that during the initial custody proceeding the custodial parent did not require a “compelling reason” for relocation. \textit{See id.} at 221, 541 A.2d at 1203-04 (1988). The court nevertheless described the benefits of the move. \textit{Id.} at 227, 541 A.2d at 1206.

\textsuperscript{\text{96}} Connecticut and Iowa also distinguish between physical and legal custody. Connecticut “permits a court to award joint legal custody, but to award physical custody to one parent.” \textit{Blake}, 207 Conn. at 223, 541 A.2d at 1204 (referring to the requirements of CONN. GEN. STAT. § 46b-56(a) (1986)). Iowa also differentiates between joint custody and physical care. \textit{See In re Marriage of Stickle}, 408 N.W.2d 778, 780 (Iowa Ct. App. 1987). \textit{See generally}, Chambers, \textit{supra} note 75, at 477 (suggesting solutions for custody disputes); Schepard, \textit{Taking Children Seriously: Promoting Cooperative Custody After Divorce}, 64 TEX. L. REV. 687 (1985) (promoting cooperative post-divorce parenting); Woolley, \textit{supra} note 25, at 16 (listing
court recognized that, although location may change, the physical custody of the custodial parent does not, and the decision-making ability of the noncustodial parent, granted through legal custody, is not presumptively diminished.

The present New Jersey rule, recently formulated in *Holder v. Polanski*, changes the emphasis of removal determinations. The standards previously discussed focus on the benefits of relocation to the child or custodial parent. *Holder* looks instead to whether the child will suffer from the relocation and reinterprets the statutory

variou types of shared parenting arrangements); Comment, supra note 75, at 577 (advocating the use of joint custody, and describing its advantages and disadvantages).

97. See Yannas, 395 Mass. at 707-09, 481 N.E.2d at 1155-57. The father in Yannas, attempted to have the custody decree modified to recognize a presumption in favor of joint physical custody. Id. at 709, 481 N.E.2d at 1157. The court held that "[n]o state to our knowledge has adopted by judicial decision a presumption in favor of joint physical custody . . . [which] is appropriately left to the judge for determination unfettered by any [such] presumption . . . ." Id.

98. Cf. Yannas, 395 Mass. at 711, 481 N.E.2d at 1158 (holding that "[t]he fact that visitation by the noncustodial parent will be changed to his or her disadvantage cannot be controlling.").


100. See supra notes 58-98 and accompanying text (describing those standards requiring benefit to either custodial parent or child). Earlier New Jersey cases also required a showing that the relocation would be beneficial. See Cooper v. Cooper, 99 N.J. 42, 56, 491 A.2d 606, 613 (1984); D'onofrio v. D'onofrio, 144 N.J. Super. 200, 206, 365 A.2d 27, 30, aff'd per curiam, 144 N.J. Super. 352, 365 A.2d 716 (1976).

101. See *Holder*, 111 N.J. at 349, 544 A.2d at 855. Virginia and Wisconsin have also shifted away from requiring benefit. Virginia, without statutory authority, specifically rejected the Cooper "real advantage" standard, in favor of a consideration of detriment to the child in restricting removal. See Simmons v. Simmons, 1 Va. App. 358, 362-63, 339 S.E.2d 198, 201 (1986) (citing standards established in Gray v. Gray, 228 Va. 696, 324 S.E.2d 677 (1985)). The Wisconsin Supreme Court, in view of a new statute favoring joint custody, held that restraining an out-of-state move "requires a finding that removal . . . will significantly harm or impede the child's relationship with the noncustodial parent and that this harm to the relationship will work to the child's detriment." Bohms v. Bohms, 144 Wis. 2d 490, 494, 424 N.W.2d 408, 409 (1988) (quoting Long v. Long, 127 Wis.2d 521, 534-35, 381 N.W.2d 350, 357 (1986)) (referring to the effects of the joint custody statute, Wis. STAT. § 767.327 (Supp. 1988), upon relocation decisions). But see Raines, supra note 56, at 656 (arguing that "[i]t is rarely in the child's best interest to change geographical locations subsequent to a divorce . . . ").

The standard applied in Colorado is also very similar. See Casida v. Casida, 659 P.2d 56, 58 (Colo. App. 1982) (sustaining the trial court's ruling that relocation was "not detrimental to the best interests of the child" upon father's petition to prevent removal). The Casida court placed the burden of proof on the noncustodial parent, because any other ruling:

would require every custodial parent faced with the prospect of establishing a new residence outside the jurisdiction of the trial court initially awarding permanent orders to obtain a judicial order modifying extant visitation rights prior to such move. Such requirement would result in increased utilization of judicial forums in an area where experience supports the conclusion that judicial interference should be kept at
cause requirement to hold that "short of an adverse effect on the noncustodial parent’s visitation rights or other aspects of a child’s best interests, the custodial parent should enjoy the same freedom of movement as the noncustodial parent." Previous decisions required a showing of real advantage to the parent, but today custodial parents with custody decrees subject to New Jersey jurisdiction can move to another state as long as their request to relocate is made in good faith. The court implied that, to prevent removal, the non-custodial parent must prove hardship such as loss of visitation, a minimum. Placing the burden of seeking judicial relief upon the party who protests a relocation should encourage private resolution of the emotional and ideological issues both parents invariably confront in these cases.

Id.

102. The statute allows the court to authorize removal of the child from the state “upon cause shown . . . .” N.J. STAT. ANN. § 9:2-2 (1976). The New Jersey relocation statute provides, “[w]hen the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living separate . . . they shall not be removed out of its jurisdiction . . . without the consent of both parents, unless the court, upon cause shown, shall otherwise order.” Id. (emphasis added).

This statute is a mirror image of the Massachusetts relocation statute. See MASS. GEN. LAWS ANN. ch. 208, § 30 (West 1987); see also Yannas v. Frondistou-Yannas, 395 Mass. 704, 481 N.E.2d 1153 (1985) (interpreting a mirror image of the New Jersey relocation statute to apply a stricter standard); supra note 87 (setting forth the Massachusetts relocation statute).

103. Holder, 111 N.J. at 352, 544 A.2d at 856. The Montana Supreme Court has also held that:

[A]ny interference with this fundamental right [to travel] must be made cautiously, and may only be made in furtherance of the best interests of the child. To that end, we require the parent requesting the travel restriction to provide sufficient proof that a restriction is, in fact, in the best interests of the child.

In re Marriage of Cole, 224 Mont. 207, 213, 729 P.2d 1276, 1281 (1986). But see Note, supra note 21, at 490 (arguing that “a child's best interests are safeguarded only if the custodial parent is required to satisfy a heavy evidentiary burden.”).

104. See, e.g., Cooper v. Cooper, 99 N.J. 42, 56 491 A.2d 606, 613 (1984) (placing the burden of proof on the custodial parent to show real advantage as a threshold requirement before balancing other factors); D'onofrio v. D'onofrio, 144 N.J. Super. 200, 206, 365 A.2d 27, 30, aff’d per curiam, 144 N.J. Super. 352, 365 A.2d 716 (1976) (determining that when there is a real advantage to relocating children far away, the court must weigh many factors); Dixon v. Dixon, 72 N.J. Eq. 588, 66 A. 597 (Ch. 1907) (denying removal for fear of loss of visitation); supra note 71 (outlining the elements of the D'onofrio balancing test later used in Cooper).

105. Holder, 111 N.J. at 352-53, 544 A.2d at 856. Good faith in this instance means that the custodial parent’s wish to move is not coupled with or masking a desire to thwart the noncustodial parent’s visitation privileges. See id.

Iowa, without statutory authority, also allows the parent awarded physical care to relocate, testing such factors as reasons for removal, advantages of the move, impact, etc. See In re Marriage of Stickle, 408 N.W.2d 778 (Iowa Ct. App. 1987).

106. See Holder, 111 N.J. at 353-54, 544 A.2d at 856-57.

107. See id. The court, however, specifically stated that “[n]ot every change in a visitation schedule will prejudice [visitation] rights . . . .” Id. See generally Henszey, supra note 47,
or other possible detriment to the child.\textsuperscript{108} The standard was changed in recognition of the parity between men and women being approached in custody determinations,\textsuperscript{108} and the implicit realization that the noncustodial parent has the right to move elsewhere for virtually any reason.\textsuperscript{110}

Minnesota has one of the least restrictive relocation standards, which looks upon the denial of relocation as a \textit{de facto} custody modification.\textsuperscript{111} In \textit{Auge v. Auge},\textsuperscript{112} the Minnesota Supreme Court looked to a custody modification statute,\textsuperscript{113} and found that the underlying

\begin{verbatim}
108. See Holder, 111 N.J. at 353-54, 544 A.2d at 856-57. "The emphasis . . . should not be on whether the children or the custodial parent will benefit from the move, but on whether the children will suffer from it." Id. at 353, 544 A.2d at 857 (emphasis added).
109. Id. at 349, 544 A.2d at 855.
110. See id.; see also supra notes 41-42 and accompanying text (discussing the freedom of movement available for the noncustodial parent).
111. Compare Auge v. Auge, 334 N.W.2d 393, 395 (Minn. 1983) (noting that refusing relocation often results in a modification of the custody decree) with Hornbeck v. Hornbeck, 702 P.2d 42, 45-46 (Okla. 1985) (holding that a relocation which effectively denies visitation supports modification of the custody decree).
112. 334 N.W.2d 393 (Minn. 1983).
113. See id., at 396-97. The Minnesota Supreme Court recognized a custody modification statute as the authority most important to deciding removal conflicts. See MINN. STAT. ANN. § 518.18(d) (West 1988). The statute provides:

Modification of order
(d) If the court has jurisdiction to determine child custody matters, the court shall not modify a prior custody order unless it finds, upon the basis of facts that have arisen since the prior order, or that were unknown to the court at the time of the prior order, that a change has occurred in the circumstances of the child or the custodian and that the modification is necessary to serve the best interests of the child. In applying these standards the court shall retain the custodian established by the prior order unless:

(i) The custodian agrees to the modification;
(ii) The child has been integrated into the family of the petitioner with the consent of the custodian; or
(iii) The child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

Id. Although noting that "[t]his statute most frequently comes into play upon a noncustodial parent's motion that custody be transferred to him or her, rather than in the context of a motion for removal from the state," \textit{Auge}, 334 N.W.2d at 396-97, the court found the underlying considerations of both issues similar, id., and viewed denying permission to remove as a conflict often resulting in a modification of custody. Id at 395-96. This view has resulted in a very relaxed standard. The \textit{Auge} court decided that "[t]he modification] statute should be construed as establishing an implicit presumption that removal will be permitted, subject to the noncustodial parent's ability to establish that removal is not in the best interests of the child," id. at 397, and the court's position is justified by its reading of the statute dealing most di-
\end{verbatim}
considerations of relocation determinations are similar to petitions for transfer of custody. To prevent relocation, the noncustodial parent must present a *prima facie* case against removal to obtain an evidentiary hearing for custody modification, and permission to remove may be allowed without a hearing if a *prima facie* case is not established. At the hearing, the burden of proof is on the noncustodial parent to prove that the proposed move will undermine the child's best interests.

Use of a custodial modification statute in this manner results in virtually the same result as the California rule allowing a custodial parent nearly complete freedom to choose a home for the child.

rectly with relocation. See *Minn. Stat. Ann.* § 518.175 subdiv. 3 (West Supp. 1988), set forth *infra* note 115. The decision held that although "[t]his statute should not be read to exclude all other grounds for denial . . . . [T]he limited purpose of the statute is to safeguard the visitation rights of the noncustodial parent." *Auge*, 334 N.W.2d at 397. The *Auge* decision could also be read to place the burden of proof on the custodial parent to show that removal will not hurt the noncustodial parent's visitation, therefore undermining the child's best interests. A reading of the statute in this fashion might radically alter Minnesota relocation decisions, and restrict relocation considerably.

114. *Auge*, 334 N.W.2d at 397. The *Auge* court did not differentiate between legal and physical custody, see *supra* notes 93-98 and accompanying text (describing the differences between physical and legal custody); cf. *In re Marriage of Stickle*, 408 N.W.2d 778, 780 (Iowa Ct. App. 1987) (differentiating between joint custody and physical care). The *Auge* decision focused on the original custody determination, which named the mother as the custodial parent. 334 N.W.2d at 395.

115. See *Auge*, 334 N.W.2d at 397; see also *Gordon v. Gordon*, 339 N.W.2d 269, 271 (Minn. 1983) (extending the *Auge* decision to joint custody situations); *Madgett v. Madgett*, 360 N.W.2d 411, 413 (Minn. Ct. App. 1985) (following the *Auge* presumption that removal is in a child's best interest).

The implicit presumption is created by reference to the actual removal statute, *Minn. Stat. Ann.* § 518.175 subdiv. 3 (West 1988), in which interference with visitation is the only specified reason for denying relocation. The statute provides:

*Visitation of children and noncustodial parent.*

Subd. 3. The custodial parent shall not move the residence of the child to another state except upon order of the court or with the consent of the noncustodial parent, when the noncustodial parent has been given visitation rights by the decree. If the purpose of the move is to interfere with visitation rights given to the noncustodial parent by the decree, the court shall not permit the child's residence to be moved to another state.

*Id.* (emphasis added). Although the emphasized portion of the statute only mentions thwarting of visitation rights as the reason for denial of permission to remove, the court pointed out that this did not exclude other reasons for denying removal, if the other reasons evidenced an undermining of the child's best interests. *Auge*, 334 N.W.2d at 397.


117. *Id.*

118. *Id.* at 397.

The California "residence" statute recognizes a strict presumption in favor of relocation, which is only denied when removal threatens the child's welfare.

IV. HARMONIZING STATE RELOCATION LAWS

The existence of such divergence between state removal laws is unfair to both parents. The "accident" of where a couple is divorced should not arbitrarily favor one partner's parental rights at the cost of the other partner's liberty, nor vice versa. In light of the mobility of American society, it is likely that the location of the divorce is not the only area of the country in which the family has lived, nor where it would have remained. A parent, unfamiliar with the differences in the laws between the various states, is playing a game of chance, betting the extended future against the probability that the law will swing in his or her favor. Harmonizing the diverse state laws would solve this dilemma, and further the benefits of other unifying legislation.

The problems inherent in the diversity of state laws can be solved through either of two avenues. The first is a uniform act, adopted by all state legislatures, and the second is federal legislation.

The state is the traditional forum for domestic relations adjudication.
cation, and a uniform act passed by the state legislatures would promote the state position as the traditional regulator of family law matters. Such regulation is merely an extension of the state’s traditional parens patriae power, which includes the power to act for the protection of minors. The state can balance this concern against the rights of both parents in legislating relocation issues.

At first glance, this appears to be a workable solution, but any rule is subject to interpretation, and the force of precedent between differing state courts of last resort is at best advisory. Therefore, use of a uniform law in this instance would only perpetuate the same problems of friction and conflict between the states because of the predictable divergence in state court interpretations. Federal legislation would be the alternative. Congress previously entered the area of child custody because it recognized the difficulties of administering custody decisions outside state boundaries.

124. See H. Clark, supra note 3, at 787.
125. Id.
126. See id.; supra note 24 (discussing parens patriae jurisdiction).
127. This protection is a result of “[t]he State’s special concern with the interrelated, although of course not identical, matters of custody and visitation [and] is not newborn.” Weiss v. Weiss, 52 N.Y.2d 170, 175, 418 N.E.2d 377, 380, 436 N.Y.S.2d 862, 865 (1981). See generally Custer, supra note 24, at 195 (outlining the foundations of parens patriae power).
128. See supra notes 36-44 and accompanying text (discussing the conflict between the interest in freedom of travel and parental rights).
129. See infra notes 145-150 and accompanying text (suggesting relocation legislation).
130. Divergent interpretations arise consistently in the context of statutory interpretation, compare Yannas v. Frondistou-Yannas, 395 Mass. 704, 711, 481 N.E.2d 1153, 1158 (1985) (interpreting the cause requirement of its relocation statute to compel a showing of “real advantage” to the custodial parent) with Holder v. Polansky, 111 N.J. 344, 350, 544 A.2d 852 (1988) (implying that the cause requirement of the New Jersey relocation statute, a mirror image of the Massachusetts law, permits relocation unless the noncustodial parent can prove hardship), and in the context of common law decision-making, compare Weiss, 52 N.Y.2d at 170, 418 N.E.2d at 377, 436 N.Y.S.2d at 862 (requiring exceptional circumstances to permit a removal); with Bloss v. Bloss, 147 Ariz. 524, 711 P.2d 663 (interpreting the New York exceptional circumstances test to apply a significantly less restrictive standard).
131. The divergence among state courts in the interpretation of a uniform law is clearly demonstrated by cases interpreting § 2-207 of the Uniform Commercial Code. Compare Marlene Indus. Corp. v. Carnac Textiles, Inc., 45 N.Y.2d 327, 333, 380 N.E.2d 239, 242, 408 N.Y.S.2d 410, 418 (1978) (recognizing that a response to an offer containing an arbitration clause is not an acceptance because an arbitration clause is a material addition to a contract) with Dorton v. Collins & Alkman Corp., 453 F.2d 1161, 1169 (6th Cir. 1972) (stating that “the question of whether the arbitration provision materially altered the oral offer under Subsection 2-207 (2)(b) is one which can be resolved only by the District Court on further findings of fact in the present case.”).
the harm to the children and families involved, and the burdens on interstate commerce. The prior federal legislation sought to ease the enforcement of custody and visitation rulings between the states, and "discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child . . . ." Questions about relocation touch many of the same issues, including harm to children, problems with visitation, and the preservation of relationships with both parents. Congressional action can address these concerns and strike a singular balance between the right to travel and parental rights.

Harmony can be established through a reconciliation of the various state laws. Any new legislation must recognize the trend toward relaxation of removal standards, the increased mobilization of the American population in general, and at the same time guard the parental rights of the noncustodial parent. Even though the states already agree that relocation decisions must protect the best interests of the child, conflict centers around what is necessary to protect those best interests. The legislation suggested by

133. See 28 U.S.C. § 1738A; see also supra note 13 (concerning the effects of the Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction Act).
134. 28 U.S.C. § 1738A.
135. See supra note 48 (listing state courts recognizing the best interests of the child as a paramount concern).
136. Holder v. Polansky, 111 N.J. 344, 353, 544 A.2d 852, 856 (1988) (stating that "[the court] should . . . consider whether the move will . . . adversely affect the visitation rights of the noncustodial parent.").
137. Before the advent of federal legislation in this area, there was fear that "once the parent and child are outside of the jurisdiction of the court they are for all practical purposes beyond the reach of its decrees . . . ." Milne v. Goldstein, 194 Cal. App. 2d 552, 557, 15 Cal. Rptr. 243, 245 (1961).
138. See Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (recognizing constitutional protection of freedom of travel); see also supra note 16 and accompanying text (discussing freedom of travel).
139. See supra note 17. But cf. Hershkowitz, supra note 3, at 296 (arguing that the Supreme Court unnecessarily usurps state power when it enters parental rights termination proceedings).
140. See supra note 56 and accompanying text.
141. See supra notes 1-13 and accompanying text.
142. See supra note 40.
143. See supra notes 46-49 and accompanying text.
144. Compare McAlister v. Patterson, 278 S.C. 481, 483, 299 S.E.2d 322, 323 (1982) (recognizing a presumption that removal is against the child's best interests) and In re Marriage of Eckert, 119 Ill. 2d 316, 518 N.E.2d 1041, 1044 (1988) (inferring that if the move is to the child's advantage, then the child's best interests are served) and Weiss v. Weiss, 52 N.Y.2d 170, 175, 418 N.E.2d 377, 380, 436 N.Y.S.2d 862, 865 (1981) (protecting the child's
this Note in Part V is a compromise between the various state views. Although not specifically noted, it entails a balancing of the interests of both parents. The burden of production is borne by the custodian, and the final burden of proof rests on the noncustodial parent. The suggested legislation not only attempts to achieve the interests of both parents, but also insures maintenance of the child's quality of life.

V. SUGGESTED RELOCATION LEGISLATION

REMOVAL OF MINOR CHILD[REN] FROM JURISDICTION OF COURT DETERMINING CUSTODY: SECTION 101: DEFINITIONS

A. Removal: long-term temporary or permanent migration from within the jurisdiction of the state court determining the custody decree to another state or to a foreign country.

B. Custodial Parent: the adult who has the position of primary responsibility for the daily care of the minor child[ren] and is the adult who provides, for example but not determinatively:

   (1) the principle residential arrangements for the minor child[ren]; or
   (2) the majority of day-to-day guidance of the minor child[ren]; or
   (3) the majority of minor day to day decisionmaking about or for the minor children.

C. Minor Child: a child who is under the age of eighteen and is:
(1) a member of a divorced or dissembled family unit; or
(2) the subject of a previous or forthcoming custody determination
   (a) by mutual agreement of the minor child[ren]'s parents, or
   (b) by judicial decree.

D. Best Interests: in the context of removal questions, best interests refers to the minor child[ren]'s ability to maintain a worthwhile relationship with the custodial parent.

   (1) If during divorce proceedings—
      (a) to allow ample visitation by the noncustodial par-

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best interests requires a showing of extraordinary circumstances to justify removal with Holder v. Polansky, 111 N.J. 344, 349, 544 A.2d 852, 855 (1988) (holding that a child's best interests are served if they suffer no detriment by the removal) and Auge v. Auge, 334 N.W.2d 393, 397 (Minn. 1983) (presuming that removal is in the best interests of the child). See supra notes 54-121 and accompanying text (outlining the differences between the states).
ent in a schedule that:

i. allows the creation of a stable home atmosphere;\textsuperscript{145} and

ii. allows the continuance of a meaningful relationship with the noncustodial parent, with full emphasis given to the range of alternate visitation schedules available in the particular situation.\textsuperscript{146}

(2) If after the divorce decree—

(a) equivalent (although not necessarily equal) to the existing relationship of the post-divorce period.\textsuperscript{147}

E. Cause: A demonstration of good faith by the custodial parent. A prima facie showing of good faith by the custodial parent is evidenced by:

(1) a good reason, from the custodial parent’s perspective, for the move; and

(2) demonstration of perspective living arrangements for the custodial parent and minor child[ren] equivalent (although not necessarily equal) to living arrangements presently available.

(a) Demonstration of prospective living arrangements carries a rebuttable presumption of suitability.

(3) A good reason may include, but is not limited to\textsuperscript{148}

(a) remarriage; or

(b) return to location of other members of custodial parent’s family or other previously supportive though unrelated persons; or

(c) career advancement or greater job opportunity; or

\textsuperscript{145} Cf. Madgett v. Madgett, 360 N.W.2d 411, 413 (Minn. Ct. App. 1985) (holding that “[t]here is a presumption that a request by the custodial parent to remove the child to another state is in the best interests of the child . . . to encourage continuity and stability in post-dissolution family relationships.”).

\textsuperscript{146} Cf. Holder, 111 N.J. at 353, 544 A.2d at 857 (stating that “[m]aintenance of a reasonable visitation schedule by the noncustodial parent remains a critical concern, but in our mobile society, it may be possible to honor that schedule and still recognize the right of a custodial parent to move.”).

\textsuperscript{147} Cf. Yannas v. Frondistou-Yannas, 395 Mass. 704, 711, 481 N.E.2d 1153, 1158 (1985) (recognizing that “[j]if [the noncustodial] parent is unfit or has not exercised his or her rights of visitation, the judge’s problem is less difficult than in the case of a diligent noncustodial parent.”).

\textsuperscript{148} Cf. Holder, 111 N.J. at 352-53, 544 A.2d at 856 (stating that “any sincere, good-faith reason will suffice, and that a custodial parent need not establish a ‘real advantage’ from the move.”).
(d) health reasons.

i. Removal for health reasons, either physical or mental, must be proved by a preponderance of the evidence, as a matter of law.

ii. A custodial parent is not subject to an examination by other than his or her own physician to substantiate the removal for health reasons, except upon the courts discretion.

(4) Presentation of evidence by the noncustodial parent of an attempt on the part of the custodial parent to undermine the relationship between the noncustodial parent and the minor child[ren] is evidence of bad faith and gives the court discretion to restrain removal.\(^{149}\)

F. Objection: A good faith objection by the noncustodial parent to removal of the minor child[ren] by the custodial parent, based on a feared diminution in the relationship of the noncustodial parent and minor child[ren].

(1) A custodial parent may rebut the objection with a showing, by a preponderance of the evidence, of a desire to thwart the custodial parent through objection to removal.

(2) In a proceeding after the original divorce decree the noncustodial parent must demonstrate good use of previous visitation privileges during the post-divorce period, subject to rebuttal by the custodial parent.\(^{150}\)

G. Welfare: The physical and mental health and well-being of the minor child[ren].

(1) To evidence the undermining of the well-being of minor child[ren], the parent claiming such undermining must demonstrate:

(a) the undermining of the physical health and well-

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149. Cf. Milne v. Goldstein, 194 Cal. App. 2d 552, 557, 15 Cal. Rptr. 243, 245 (1961) (stating that "if the specific motive is the frustration of the other parent's visitation rights and is unrelated to the child's welfare, permission to remove will be denied."); Holder, 111 N.J. at 353, 544 A.2d at 856 (holding that "[i]f the court should find that the purpose of the move is to thwart the non-custodial parent's visitation rights, that obviously will not satisfy the [statutory] test.").

150. Cf. In re Marriage of Eckert, 119 Ill. 2d 316, 327, 518 N.E.2d 1041, 1044 (1988) (weighing the noncustodial parent's exercise of visitation rights granted in the custody decree in decisions about permitting relocation); Yannas, 395 Mass. at 711, 481 N.E.2d at 1158 (finding the exercise of visitation rights applicable to the balancing test used in relocation decisions).
being of the minor child[ren] by a preponderance of the evidence; or

(b) the undermining of the mental health and well-being of the minor child[ren] by clear and convincing evidence.

H. Siblings: Minor children who:
(1) are members of the same family unit under subsection C(1) of this section and
(2) are subjects of a divorce decree under § 101(C)(2) of this heading.

SECTION 201: PETITION FOR REMOVAL OF MINOR CHILDREN FROM JURISDICTION

Subject to the definitions in § 101 of this heading:

A. A court of proper jurisdiction will authorize a custodial parent’s petition to remove a minor child from its jurisdiction if:

(1) the custodial parent makes a prima facie showing of cause in favor of removal; and
(2) the noncustodial parent’s objection is not supported by a preponderance of the evidence, subject to the conditions of § 201(C) of this heading.

B. A court of proper jurisdiction has discretion to restrain the custodial parent’s removal of a minor child from that jurisdiction if:

(1) the best interests of the child will suffer significantly; or
(2) the welfare of the child will be undermined at the perspective removal location.

C. To restrain removal, absent a showing of the custodial parent’s bad faith by a preponderance of the evidence, the noncustodial parent must demonstrate a willingness and ability to assume the position of custodial parent to the minor child[ren].

(1) Ability to assume the position of custodial position includes fulfilling the conditions of § 101(E)(2) of this heading.

D. If more than one sibling is involved in the relocation, and one sibling is disqualified from removal, the court may authorize a change in custody of that minor child to the noncustodial parent, and permit removal of the custodial parent and the other siblings, if such does not undermine the welfare of any of the siblings.
V. CONCLUSION

The "accident" of where a divorce takes place should not arbitrarily govern the futures of parent and child. Custodial parent relocation decisions require uniformity between the states to promote impartiality and to further the policies of earlier legislation. The increasing mobility of American society in recent years justifies modification of existing state laws. The adoption of national legislation, by unanimous state action or Congressional preemption, would eliminate the relocation game of chance currently played by the post-divorce family.

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