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Starting Over: The Heuristics of Family Relocation Decision Making

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INTRODUCTION

The father was the primary caretaker for the first three years of their daughter's life. Then the mother and father separated, and the mother and child lived together, although the father continued to be actively involved in the daughter's life. Two years later, the mother fell in love with and became engaged to another man and disclosed that she planned to move with the child to a distant state, where her new husband lived and worked. The father protested the move and sought a restraining order.

The court-appointed expert testified that the move would bring some emotional harm to the child, who would not be able to see the father as much as she would like to do but noted that the same would be true if she were not permitted to move with
her mother. The expert concluded that the mother had carefully prepared a proposal to adjust for longer periods of access for the father and that, on balance, was a damage limitation exercise that called for both parents to minimize any distress to the child due to the recommended relocation.

This family relocation dispute arose in England but could have occurred in Belgium, Brazil, Sweden, Illinois, or in any other state of the United States. Relocation continues to be the subject of commentary and law reform around the globe as lawmakers are confronted by an increasingly mobile generation of divorced parents who seek new opportunities in reconstituted families.

Currently, one-half of all American marriages end in divorce, and most of those marriages produce children. One million children each year experience the divorce of their parents, and perhaps as many as 750,000 children will relocate with their custodial caretaker to a community some distance from their other parent. It is estimated that as many as three out of four custodial mothers move at least once within the four years immediately following a divorce. In fact, the most common family-related reason given for relocation by those surveyed was a change in marital status. Of those relocating, one-half move more than one time. Child custody relocation cases display all of the thorny, seemingly indeterminate, characteristics of all other custody disputes and yet carry a special sting: one

1 The trial court permitted the relocation and the appellate court affirmed. See generally Re H, 1998 Fam. 390 (1998) (reviewing and affirming the trial judge's judgment that allowed the custodial parent to move from England to America with her child). Lord Thorpe quoted with approval Lord Ormrod's comments in Chamberlain v. De La Mare, 13 Fam. 15 (1983), and Poel v. Poel, 1 W.L.R. 1469 (1970).


4 Anne L. Spitzer, Moving and Storage of Post-divorce Children: Relocation, the Constitution and the Courts, 1985 ARIZ. ST. L.J. 1, 3.


6 Spitzer, supra note 4, at 3.
concerned, loving, and responsible parent may lose his relationship with his child through no fault of his own, and the child may also be harmed by the loss of that relationship. The custodian who wants to relocate with the child, however, usually also can present an appealing claim that the move will bring substantial benefits: more family income, enhanced educational opportunities, and proximity to extended family members. Each parent asserts that his or her position will better serve the child’s interests. It is hard to imagine a more difficult reallocation decision for the family members, courts, and scholars seeking optimal guidelines for such decision making.

Divorce always brings family reconstitution—often in a different locale. Relocation impasse cases have become a phenomenon engendering public concern, study, and reform proposals as well as polemics, diatribes, and pontifications. Relocation is a burning issue in the European community, Canada, Australia, and the United States. It is an issue that has occasioned conferences\(^7\), symposia, international surveys, and an agenda item for feminists\(^8\) and fathers\(^9\) around the world. It is an issue that has divided social scientists\(^10\) and baffled appellate courts. Because the predominant legal standard—what is in the “best interests of the child”—is so imprecise, every potential decision maker is inclined to shuffle off the resolution to someone else in a wondrous modern parody of the nursery rhyme “This is the House that Jack Built.”

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\(^10\) See infra notes 144–46.
The absence of rules with a dollop of opportunistic behavior inclines parents to litigate and leave the custody determination to the judge. The trial court, charged with the impossible task of predicting the future behaviors and circumstances of the mother, father, and child—rather than its familiar role of finding the salient facts of past events—wants an expert to tell it what to do. The expert, usually a clinician with few powers of accurate prognostication,\(^\text{11}\) wants illumination from empiricists who respond that they can only speak to aggregate probabilities and not individual families, fathers, mothers, or children. Appellate courts wrap about them their mantle of deference to the participant-observer trial court,\(^\text{12}\) duly noting the legislature's grant of broad discretion to the fact finder.\(^\text{13}\) A final judgment is imprinted, which is only final until the next round when one of the parents seeks its modification.

In the twentieth century, the state's *parens patriae* role in protecting the children of divorce has been focused on developing the optimal substantive standard for resolving child custody disputes. That same preoccupation has characterized the scholarship aimed at resolving relocation cases: what rule should be used to decide whether to approve the move? Should there be a presumption in favor of the primary residential custodian or the nonmoving parent? What parenting behaviors are relevant to this determination? Is a particular rule gender-biased or not? Each proposal for a substantive relocation rule is flawed, though

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\(^\text{11}\) As Anna Freud warned, it is impossible to predict how any particular child will fare in the future or to make meaningful comparisons between future alternative placements for an individual child. *See* Anna Freud, *Child Observation and Prediction of Development: Memorial Lecture in Honour of Ernst Kris*, 13 THE PSYCHOANALYTIC STUDY OF THE CHILD 92, 97-98 (1958).

\(^\text{12}\) In her early seminal article, Joan G. Wexler noted the general proposition that in her study of custody modification actions, appellate courts typically affirmed the trial court. *See Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 762 (1985). Our study of all reported relocation decisions during the past three years shows that the appellate court affirmed 110 of 151, or 70%, of the cases. It did not seem to matter what rule was in play or whether the trial court granted relocation or denied it. Trial courts have considerable discretion and exercise it with apparent abandon. For example, though Quebec and the common law provinces of Canada have different relocation standards, a recent report indicates that the trial courts' decisions are not dramatically different. In both Canadian legal systems, relocation was granted in a majority of cases. *See* Bailey & Giroux, *supra* note 2.

some are more seriously flawed than others. After two decades of doctrinal development, no optimal rule for resolving disputed relocation has emerged.

The thesis of this Article is that relocation issues, like all other issues affecting children, should be resolved by the parents themselves because, both during their relationship and after their separation, they are the most concerned and most knowledgeable about their child’s best interests. I will conclude that the process of resolving relocation disputes, through the use of counseling, education, and mediation should, to the maximum extent possible, be substituted for litigation. In an ideal world, litigation should be foreclosed. Nonetheless, realizing that negotiation and mediation will not work for all parties and that substantive rules do provide incentives and risks that impact parties’ willingness to negotiate, choices of substantive rules in litigation must be considered.

Part I of this Article lays out the evolution of the doctrinal backdrop of the particular issue of relocation. Until 150 years ago, child custody disputes, including residential decisions, were non-justiciable. The story of the twentieth century is open-ended custody litigation, and that development has worked great mischief. Part II focuses exclusively on the spread of American litigation rules for resolving custodian relocation. This demonstration proves that the substantive rules governing the litigation of relocation disputes are non-rules because they do not produce predictable results and encourage litigation. Furthermore, this Article highlights that the substantive standards apply across the board and do not distinguish between disputes in which there are significant noncustodial relationships at risk and those in which there are not.

The reform goal of Part III refocuses concern only upon disputes in which there is a significant relationship at stake. In cases in which there is only an inchoate relationship, the custodial parent ought to be able to relocate, subject only to an extremely strong showing by the other, inactive parent of harm to the child from the relocation. For the smaller pool of controversies that remain, the best available substantive rule is determined using two principal criteria: first, potential to encourage negotiation and discourage litigation; and second, ability to diminish the five major stressors for children of separated parents. The conundrum confessed here, at the
outset, is that any rule that narrows the grounds for litigation may also empower one party to be less willing to negotiate in good faith.

Ultimately, the least detrimental alternative rule is one requiring that, when an objection is filed by the noncustodial parent, the potential relocation parent must carry a three-fold burden of proof: (1) that counseling and mediation have been attempted in good faith and failed; (2) that the relocating parent has provided a reasonable plan for ensuring and supporting the child’s continuing relationship with the other parent, including the sharing of contact costs; and (3) that the direct benefits for the child of the move outweigh the particular harm of the loss of significant, frequent contact enjoyed by the child and the other parent. Though a close call, placing the burden of proof upon the relocating parent seems necessary to induce that parent to negotiate and to offer sufficient inducements for remodeling the other parent-child relationship.

Part IV considers how the process of resolving relocation disputes might be re-engineered to encourage mediation and avoid needless conflict. What is the responsibility of the state, as parens patriae, when it confers the right to divorce and adjudicates parental rights? How can the harm to a child be minimized? This section suggests that the most important changes the legal system should make involve altering the processes used to resolve parents’ future relationships with the child, despite the relocation.

I. THE EMERGENCE OF THE BEST INTERESTS OF THE CHILD CONCERN

The notion that a child’s interests are independent and severable from those of his caretakers, much less that they ought to be superior considerations, is a recent invention. The common law accorded great authority to a minor’s father and later, when custody disputes became justiciable, to the child’s guardian.  

The guardian, historically the father, had sole decision-making authority and was not even required to consult with the other parent on any matters of upbringing. Unless the father granted

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access to his children's mother, she had no cause of action to force him to permit her to see her children until 1839 when "Talfourd's Law" was enacted by Parliament. Residential decisions clearly fell within the custodian's prerogatives. By the late nineteenth century, in the early hours of parens patriae, the Field Code of 1865 stated only slightly more restrictively: "A parent entitled to the custody of a child has a right to change his residence, subject to the power of the . . . trial court in New York to restrain a removal which would prejudice the rights or welfare of the child." But certainly the courts' prevailing attitude, for over a century, in the common law and American systems was custodial deference.

In the development of the concept of parental authority, the civil law recognized that parents share parental authority during

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15 In Rex v. Greenhill, 111 Eng. Rep. 922 (K.B. 1836), the mother left with her three small children to live with her relatives when the husband abandoned them to live with his mistress. Id. at 923. The father brought habeas corpus to force the children's return to his household. Id. The court held that no right existed under British law to deny the father custody of the children of the marriage. Id. at 924. Resorting to self-help, the mother fled with the children to Europe. Id. See generally Ann Sumner Holmes, "Fallen Mothers": Maternal Adultery and Child Custody in England, 1886-1925, in MATERNAL INSTINCTS: VISIONS OF MOTHERHOOD AND SEXUALITY IN BRITAIN, 1875-1925 37 (C. Nelson & A. Holmes eds., 1997).

16 An Act to Amend the Law Relating to the Custody of Infants, 1839, 2 & 3 Vict., c. 54 (Eng.). Rather curiously, Serjeant Talfourd introduced this piece of legislation although Talfourd had represented the father in Greenhill. See Greenhill, 111 Eng. Rep. 922, 926 (K.B. 1836); Sanford N. Katz, "That They May Thrive" Goal of Child Custody: Reflections on the Apparent Erosion of the Tender Years Presumption and the Emergence of the Primary Caretaker Presumption, 8 J. CONTEMP. HEALTH L. & POL'Y, 123, 126 (1992).

17 Although Lord Mansfield had earlier coined the "best interest of the child" test in Blisssets Case, 98 Eng. Rep. 899 (K.B. 1774) ("If the parties are disagreed, the court will do what shall appear best for the child."), it lay dormant for sixty years. See generally Holmes, supra note 15; Ramsay Laing Klaff, The Tender Years Doctrine: A Defense, 70 CAL. L. REV. 335 (1982).

18 Although Custer traces the doctrine to the early seventeenth century in England, it was not well established as judicial doctrine until the late eighteenth century. Lawrence B. Custer, The Origins of the Doctrine of Parens Patriae, 27 EMORY L.J. 195, 195 (1978). It is possible, however, that the original seeds for parens patriae were sown in the Roman concept of patronus causarum, which obligated patricians to serve as protectors of not only of their own households but also of weaker members of society. See J.A. CROOK, LEGAL ADVOCACY IN THE ROMAN WORLD 31-33 (1995) (discussing the Roman patronage system).

marriage and joint authority continues upon divorce. Thus, although a custodian could unilaterally make daily decisions affecting the child, major decisions required concurrence. Whatever force that principle may have historically carried, today civil jurisdictions have extended the custodial parent's authority to encompass major decisions, subject only to the other parent's general oversight, right to be informed of all major decisions, and right to seek court review of all decisions.

During this century, the best interests of the child standard has been the prevailing, indeed near universal, test in the United States for the resolution of child custody litigation waged between parents, at least in the initial round of conflict. This same best interests standard was also used in custody modification actions until the late 1960s. Custody modification actions arise out of changes in the circumstances of the parents and child, including the moral, mental, or physical condition of a parent; changes in the household composition such as the remarriage of a custodian; changes in the physical environment in which the child is living; challenges to child-harming decisions made by the custodian; the wishes of the child; and changes in the needs of the child.

Traditionally, the parent seeking modification only needed to prove that some change had occurred since the first decree and that it jeopardized the child's best interests, therefore justifying the reconsideration of custody. Social policy favoring the finality of judgments was rather handily outweighed by concern for the welfare of the child. Finding change in the life

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20 See QUE. C. CIV., art. 80 (1981); FR. C. CIV, art. 288 (1994). The Belgian Civil Code similarly does not specifically address relocation and therefore, apparently the general authority of the court to determine where a child will live if his parents disagree governs these disputes. See BELG. C. CIV, art. 373 (1982). Rejecting its civil law roots, Louisiana has by statute singled out relocation as a decision requiring mutual consent or court order. See generally LA. REV. STAT. ANN. §§ 9:355.1-9:355.17 (West 2000).
In 1989, Great Britain rejected the concept of custody and now refers to the parental responsibility of both parents during marriage and after divorce. Children Act, 1989, c. 41(Eng.). Thus, today there is a remarkable convergence of doctrine on the European continent.
22 The judicial role has always been to protect the best interests of the child.
of a child is as easy as finding sunshine in Florida. A child morphs, sometimes dramatically over the course of years, months, or even weeks, and her physical, mental, moral, and emotional needs shift with those changes; a child is effectively a "moving target of social policy." Once the subject of litigation, the child is always thereafter considered to be in custodia legis — in the breast of the court's concern — and thus, actions to modify the terms of an original decree frequently occur. Indeed, post-divorce litigation between former spouses over issues of custody, alimony, or child support has been found to be the most disputatious and litigious type of grievance in American culture.

By the late 1960s, though the path was never straight, there was some evidence that courts were beginning to apply a more stringent standard in order to minimize the disruptive effect upon both families and courts caused by the onslaught of modification actions. Limiting reconsideration of custodial arrangements became one of the reform goals of the Uniform Marriage and Divorce Act promulgated in 1970, which called for a showing of serious endangerment to the child by any party seeking custody modification. In 1973, the publication of "Beyond the Best Interests of the Child" documented the harm

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24 See Richard E. Miller & Austin Sarat, Grievances, Claims, and Disputes: Assessing the Adversary Culture, 15 LAW & SOCY REV. 525, 534 (1980–81). The survey sampled 1,000 randomly-selected American households in each of five federal judicial districts. They screened out minor disputes involving values of less than $1,000. See id. at 534–35. A study of contested divorces found that although only 5% of those not involving children returned to court, 52% involving child custody resulted in re-litigation. One-third of those were re-litigated two to ten times. Jack C. Westman et al., Role of Child Psychiatry in Divorce, 23 ARCHIVES GEN. PSYCHIATRY 416, 417 (1970). See generally Sally Burnett Sharp, Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard, 68 VA. L. REV. 1263 (1982).

25 See Wexler, supra note 12, at 762 (summarizing modification of doctrinal development).


27 Section 409 recognized that the parents themselves could agree to modification but absent consensual changes, the redactors sought to enhance the child's stability and the finality of custody determinations. See id. at § 409 cmt. at 439; see also infra text accompanying notes 114–24.

28 JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 35
caused to children by instability and uncertainty in their living arrangements and fueled the reform movement. As Anna Freud and her colleagues recommended, anxiety caused by the possibility of legal intervention could be minimized by reducing the justiciability of the noncustodial parent's complaints. Each child's placement should be "final and unconditional and . . . pending final placement a child must not be shifted to accord with each tentative decision." Today, many courts impose a higher standard of proof upon a petitioner for custody modification.

The proposed relocation of a child's primary domiciliary custodian to a new home some distance away from the child's current residence is indisputably a substantial change in circumstances. Therefore, relocation represents a particular species of proposed change that is justiciable and can trigger judicial modification of domiciliary custody and access rights for the noncustodial parent. Although relocation disputes might have been disposed of under the general rules for modification actions, during the last decade, most states have either enacted

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29 Id. at 35. In addition, the authors wrote BEFORE THE BEST INTERESTS OF THE CHILD in 1979 and, with Sonja Goldstein substituting for the late Anna Freud, THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE in 1996. This trilogy has been called "the most influential text of this generation." Michael Freeman, The Best Interests of the Child? Is the Best Interests of the Child in the Best Interests of Children?, 11 INT'L J.L. POL'Y & FAM. 360, 360 (1997).


31 Increased sensitivity to the co-parenting objective of modern custody law has resulted in the re-labeling of "custodian" and "visiting parent" in many jurisdictions. See In re Marriage of Kovacs, 854 P.2d 629, 632 (Wash. 1993) (en banc) (noting that, in 1987, Washington completely changed the legal labels in a re-conceptualization of family relationships, substituting for example, "parenting plan" for "custody" and "parental functions" for "visititation." (citing WASH. REV. CODE ANN. § 26.09.260 (West 1996))). Similar changes have occurred elsewhere. "Primary domiciliary parent" is also now known as the "residence parent" and the visiting parent is known as the "contact parent" in England and Wales. See Children Act, 1989, c. 41 (Eng.). French law refers to "le parent chez lequel l'enfant a sa residence habituelle" [the parent with whom the child usually resides]. FR. C. CIV., art. 288 (1994). The ALI proposal substitutes for primary domiciliary parent, the term "parent exercising significant majority of custodial responsibility." ALI proposal, supra note 30, § 2.17(4)(a).

special relocation statutes or crafted special jurisprudential rules. Furthermore, both the American Academy of Matrimonial Lawyers (AAML)\textsuperscript{33} and the American Law Institute\textsuperscript{34} have chosen to treat relocation as a custody decision meriting distinct considerations.

II. RELOCATION RULES

Unlike initial and modification actions on other grounds, relocation cases display remarkably similar features. The child's primary custodial parent desires to move with the child to some other jurisdiction; in contested actions the typical move is to another state and at some distance from the child's current home and community. Sometimes the parent seeks to move for reasons that purely concern the child's welfare. Justifications might include the need to seek medical treatment,\textsuperscript{35} to reunite the child with some important relative or other significant individual, to remove the child from danger,\textsuperscript{36} or otherwise to meet the special needs or talents of the particular child. Such circumstances would ordinarily incline a court to approve the proposed relocation, finding that the advantage to the child from the relocation would outweigh any harm to the other parent and to the child from any disruption of their relationship. However, such child-centered justifications for relocation are not the scenarios that are being litigated. As might be predicted, relocating parents are not being challenged when these purposes are asserted.

Instead, the reported cases involve relocation motivated that is not primarily to benefit the child, but rather to benefit the minor's custodial parent. The custodial parent seeks to move for an equally predictable array of personal benefits: the parent has


\textsuperscript{34} See ALI Proposal, supra note 30, \S 2.17 at 354–56; infra text accompanying notes 99–112 (discussing the ALI Proposal).

\textsuperscript{35} See Baures v. Lewis, 770 A.2d 214, 219 (N.J. 2001) (involving a proposed move to Wisconsin where mother's parents could help provide special care for an autistic child).

\textsuperscript{36} See Bobadilla v. Bobadilla, No. FA 980116158, 2000 WL 1819680, at *1, *3 (Conn. Super. Ct. Nov. 17, 2000) (involving a claim that the former spouse had sexually abused the custodian parent's child by a previous marriage).
remarried and the new spouse-stepparent has been transferred to another state or wants to establish a home elsewhere; the parent needs to seek a more healthful environment or otherwise meet special needs of other family members; the parent wants to be among extended family or a supportive group of friends; the parent has found better employment opportunities; the parent wants to pursue educational opportunities; relocation will reduce the parent’s commuting time to work.

Conversely, the custodial parent may plan to move in order to escape spousal abuse, to decrease interaction and conflict with a former spouse to minimize what the custodial parent perceives as the other parent’s harmful influence upon the child, or to

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40 See In re Marriage of Thielges, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000) (custodial mother desired to return to home state because parents needed her assistance); In re Marriage of Flynn, 972 P.2d 500, 501, 505 (Wash. Ct. App. 1999) (custodial mother desired to relocate to be near her father who was dying of cancer; court remanded to permit a hearing).


45 See In the Interest of S.E.P. & M.C.P., 35 S.W.3d at 866 (mother alleging that father was involved in drug abuse and that the children feared for their safety, though the court did not make findings of fact or rest its decision on this allegation).
frustrate the other parent’s attempts to remain in a relationship with the child.\textsuperscript{46}

All relocation disputes will inherently produce disruption of the child’s physical environment and personal relationships. All relocation disputes will also carry the cost of diminished frequency of contact between the child and the noncustodial parent. Indisputably, relocation after a divorce constitutes a second uprooting, a second loss for the child. Equally predictable, the child, especially an adolescent, will resist change and the need to overcome inertia, to start over in some new place.\textsuperscript{47}

All states, British Commonwealth countries, and the member states of the European Union use the best interests of the child as the touchstone for all custody cases, including relocation disputes.\textsuperscript{48} However, in the United States, substantive variations are much more apparent. In large measure, this difference may be attributable to the shift in the United States away from concerns about the difficulties of interstate enforcement, which are now largely resolved by the Uniform Child Custody Jurisdiction and Enforcement Act.\textsuperscript{49} Inter-country dispute enforcement under the Hague Convention\textsuperscript{50} remains problematic.

There are four distinct approaches to the justiciability and resolution of relocation cases now current among American jurisdictions. These views are laid out in a progression from

\textsuperscript{46} See Braun v. Headley, 750 A.2d 624, 628 (Md. Ct. Spec. App. 2000); Mason v. Mason, 975 P.2d 340, 341 (Nev. 1999) (finding that the mother’s most likely motive was to frustrate the father’s visitation rights based at least in part upon the fact that the mother had not secured a job offer in Florida although, she wanted to move there).


unpredictability to predictability of litigation and relative certainty of result. If anything, it is an understatement that this area of the law has been "unusually unstable." However, there appears to be a pattern and perhaps even a trend toward permitting relocations.

Before turning to that analysis, a caveat seems in order. Much fictionalizing, posturing, or conceptual sleight of hand colors this area of the law. Courts often display a rather stunning jingoism to deny what appear to be reasonable requests to relocate. As trial lawyers advising how to oppose a custodial move have put it, "Do not overlook your 'home court advantage.' Present your case with the presumption that the judge will take some pride in the place he or she has chosen to live." Courts comment at length about the importance of the relationship between the child and the would-be left-behind parent and their parens patriae obligation to restrain efforts that would harm the child. However, rarely do they mention that such lofty sentiments have never been invoked to restrain the announced relocation of a noncustodial parent to whom the child was deeply attached. Gender bias and personal bias also occasionally surface. For example, in a Nevada case, the trial judge remarked in open court that he once had been separated from his son and that the separation had strained their relationship; furthermore, he cautioned that if relocation were granted, the parties' child would either feel betrayed by his father or the child would replace him with the stepfather. The appellate court affirmed the decision, finding that the judge had not improperly injected his own experiences into the proceeding. The appellate court did not comment as to whether a broad substantive standard invited such projections.

51 ALI Proposal, supra note 30, § 2.17, Rptr's com. d. at 376.
A. The Moving Parent's Double Burden: Relocation in Good Faith and in the Best Interests of the Child

The majority of states cast the burden of proof upon the relocating parent to justify the proposed change of circumstances. That stance is an application of the ordinary custody modification proof allocations: the party who seeks a revision of a judgment bears the burden of showing that the revision is warranted. Most states continue to use the comfortable old shoe, "best interests of the child" test for relocation decisions. Often they attempt to lay out a list of factors with the purpose of providing some guidance for parents, negotiators, and decision makers. These "laundry lists" typically include consideration of the moving parent's motives, requiring assurance that relocation is proposed for "legitimate" or "good faith" reasons other than to thwart the child's relationship with the other parent. This is the model endorsed by the American Academy of Matrimonial Lawyers ("AAML Model Relocation Act"). There is no presumption either for or against relocation; the moving parent must prove that the move is in the best interests of the child.

In early decisions, the burden of proof was upon the departing parent to show that relocation would produce "real advantage" for the custodian and child that would overcome the impairment of the relationship between the child and the non-relocating parent as the primary consideration in the assessment of the best interests of the child. The apparent source of this standard was D'Onofrio v. D'Onofrio, a very influential New Jersey decision. 365 A.2d at 30. New Jersey has since abandoned that separate hurdle and uses instead the best interests test. See, e.g., Baures v. Lewis, 770 A.2d 214, 224 (N.J. 2001). Although Nevada continues to impose this separate requirement upon the relocating parent, the permitted and satisfactory proofs are indistinguishable from those used by courts adopting the best interests burden of proof. See, e.g., Dick v. Dick, 383 N.W.2d 240 (Mich. Ct. App. 1985); Mason v. Mason, 975 P.2d 340 (Nev. 1999); Schwartz v. Schwartz, 812 P.2d 1268 (Nev. 1991). Jurisdictions that follow the best interests rule include Alabama and Alaska. See McQuade v. McQuade, 901 P.2d 421 (Alaska 1995); Ex parte Monroe, 727 So. 2d 104 (Ala. 1999).


The AAML Proposed Model Relocation Act leaves open the use of a presumption, giving states three choices: placing the burden of proof on the relocating parent to show good faith and that the move is in the best interests of the child; placing the burden of proof on the non-relocating parent to show that the move is proposed in bad faith and the relocation is not in the child's best interests;
The factors constituting the best interests analysis are remarkably similar from state to state. The AAML Model Relocation Act lists the following factors:

1. the quality of the relationship of child with relocating parent and with non-relocating parent, siblings, and other significant persons;
2. the age, developmental stage, and needs of the child, as well as the impact of the relocation on the child;
3. the feasibility of preserving the relationship between the non-relocating parent and the child through suitable visitation arrangements, including a consideration of logistics and finances;
4. the child's preference, taking into account age and maturity;
5. whether the relocating parent has established a pattern of conduct promoting or thwarting a relationship with the non-relocating parent;
6. whether relocation will enhance the quality of life of the relocating parent and child, including financial, emotional, and educational opportunity;
7. the reasons advanced for or opposed to relocation.

Finally, dispelling any doubt that this standard is intended to be more limited than the best interests grab-bag, the AAML Model Relocation Act concludes by authorizing the court to consider "any other factor affecting the best interest of the child." Louisiana has adopted the AAML Model Relocation Act or splitting and then shifting the burden of proof by placing the initial burden of proof upon the relocating parent to show good faith and, if that burden is satisfied, then shifting the burden to the nonrelocating parent to show non-relocation is not in the best interests of the child. See AAML Proposed Model Relocation Act, supra note 33; see also infra Part II.B.

Florida has experimented with the third option. In Russenberger v. Russenberger, 669 So. 2d 1044, 1047 (Fla. 1996), the Supreme Court of Florida held that upon a showing of good faith, a custodial parent is entitled to a rebuttable presumption in favor of relocation, taking in account the child's best interests. However, the Florida legislature subsequently amended its statutes in 1997 to reject explicitly the use of any presumption in favor of the relocating parent. FLA. STAT., ch. 97-242, § 2 (amending § 61.13, effective July 1, 1997).


Id. § 405(8).
Act,64 and Delaware courts have “adopted recommendations set forth by the [AAML].”65 While not adopting the AAML Model Relocation Act, several other states impose the double burden upon the moving parent of showing a good faith justification for the move and that the move serves the child’s best interests.66

1. Consideration of the Child’s Preference

Of special interest in the AAML list is the injunction to attend to “the child’s preference, taking into account age and maturity.” Nearly all states have statutes that either require or permit the court to consider a child’s preference, usually as part of the assessment of a child’s best interests.67 Although the child’s wishes are not binding,68 they are relevant, and there may be an implied duty upon the court to ensure that the child’s views are elicited if the child desires to be heard or to inquire if the child would like to be heard. In the last quarter century, throughout the world, custody law has been modified to include consideration of the child’s views and preferences. Article 12 of the 1990 United Nations Convention on the Rights of the Child, which speaks directly to the role of the child in custody matters, requires state parties “to assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”69

68 Two American jurisdictions make the choice of an older child binding. Mississippi permits a child of twelve to elect the parent with whom he or she would live, provided only that the elected parent is fit. Miss. Code Ann. § 93-11-65(1)(a) (2001). In Georgia the age is fourteen. Ga. Code Ann. § 19-9-3(a)(4) (2001). Even in states that do not legislatively confer such power upon a child, an older child’s preference is very persuasive. In a Virginia study, nearly 90% of the judges reported that the preferences of adolescents were either “dispositive . . . or extremely important.” Elizabeth S. Scott et al., Children’s Preference in Adjudicated Custody Decisions, 22 Ga. L. Rev. 1035, 1050 (1988).
69 Convention on the Rights of the Child, supra note 48, art. 12. In addition, Article 12 of the Charter of Fundamental Rights of the European Union, sets out a
An intrinsic problem with children's preferences, however, inherent in the very nature of immaturity is short-sightedness. As one psychiatrist has observed,

In conducting custody evaluations, I routinely ask children for three wishes. In almost every case, children wish that the family would stay together or get back together. This occurs even when children recognize that their parents will not get back together and that the parents' doing so would be a disaster for the family. In one such case a seven-year-old girl told me, "I think my parents would end up killing each other, but I still wish they would get back together."70

Children desperately desire the reunification of their parents; they fantasize and scheme about the possibility, and when hope fades, they are often angry at their parents. Relocation clearly dashes such hope and resistance to the move, perhaps accompanied with anger, can be anticipated.71 The few existing studies of the impact of children's preferences on trial court decision making suggest that judges are appropriately skeptical of children's opinions and are capable of sorting out creditable reasons for a stance.72

number of procedural and substantive rights of the child, including the right to "express their views freely...on matters which concern them in accordance with their age and maturity." Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 364 OFFICIAL J. EUR. COMMUNITIES 1, 13 (2000). Under Art. 13 of the Hague Convention, a defense to an action seeking a child's return is that the child objects. Convention on the Civil Aspects of International Child Abduction, supra note 50, art. 13. Commentators have reported that the courts of most countries have been willing to give weight to the objections of children as young as nine to justify a refusal of their return. See generally Carolyn Hamilton & Kate Standley, European Family Law, in FAMILY LAW IN EUROPE 549, 572 (Carolyn Hamilton & Kate Standley eds., 1995).

Each of these compacts stops short of requiring appointment of an independent representative for the child. This right, however, is included in a convention currently enforced in Greece only. See European Convention on the Exercise of Children's Rights, Jan. 25, 1996, Council of Europe, Europ. T.S. No. 160.

71 See generally JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980) (finding that anger was typically directed toward the child's primary caretaker, a target who would probably be less likely to reject the child because of the anger).
72 See JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 4-53 (2d. ed. 2002). The child's volunteered preference was followed in two-thirds of the 1300 decisions surveyed from 1982-1983. Id. An analysis of 272 San Diego custody decisions in 1982 revealed that the judge appeared influenced by the child's preference in only 15% of the cases. Carla C. Kunin et al., An Archival Study of Decison-Making in Child Custody Disputes, 48 J. CLINICAL PSYCHOL. 564, 572
There may be some marginal cases in which the child's preferences so sharply diverge from those negotiated by his parents or the child surfaces some hidden family secret that would influence the choice of custodial arrangements. Generally, however, researchers do not report children's distress that their wishes were rejected but anger at having no role, at being ignored, and at not being consulted about custodial arrangements. It appears that children are most insulted and troubled by being ignored and pushed to the sidelines.\(^7\)

In sum, the real issue is not whether the child's preferences ought to be heard but how much weight should be ascribed to a child's choice between relocating and remaining in the same community (albeit perhaps with another parent custodian). Research suggests that the court should hear from any older child who wants to be heard,\(^7\)\(^4\) though some delicacy is required to avoid adding to the pressure a child may feel from choosing between parents or commenting on their comparative capabilities. Even nine-year-olds have been found generally capable of giving reliable evidence\(^7\)\(^5\) and of making informed and mature judgments.\(^7\)\(^6\) Whether attributed to the "emotional state,"\(^7\)\(^7\) the impact of developmental differences,\(^7\)\(^8\) or its value laden nature,\(^7\)\(^9\) social scientists caution that a mature minor's competence to make an informed choice about medical treatment


\(^{74}\) See Scott et al., *supra* note 68, at 1046–50.


\(^{76}\) See Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1596 (1982) (comparing the responses of nine, fourteen, eighteen and twenty-one year old participants to hypothetical decision-making problems concerning medical and psychological treatment and noting no difference between the fourteen-year-old youths and the adult groups and that even the nine-year old children were as competent as the average adult according to the standards of choice and reasonableness of choice); see generally, *Reforming the Law: Impact of Child Development Research* (Gary B. Melton ed., 1987).


\(^{78}\) See Scott et al., *supra* note 68, at 1060–61.

is remarkably different from and may be lacking for a child who chooses between two parental caretakers. Any expressed preference should not trump other considerations of the child's best interests.

2. Weighing the Elements

To compound the problem that there is no perfect list of best interest considerations, the relative weights or priorities of the factors matter a great deal. As Katharine Bartlett has noted, "When the factors [of the best interests rule] do not all point in a single direction—that is, when guidelines are needed most—they leave the decision maker to decide which factors matters most, with no useful guidance from the rule itself." Thus, not only is the factored best interests of the child test a non-test but also, as the drafters of the AAML Proposed Model Relocation Act concede, if the contestants are two competent, caring parents who have had a healthy post-divorce relationship with the child, the competing interests are properly labeled "compelling and irreconcilable."

The flaw at the core of the best interests test, with or without explicit factor lists, is that the accurate prediction of litigation outcome is only slightly better than forecasting the weather. Furthermore, although courts purport to be focusing

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80 The real contribution of the AAML Proposed Model Relocation Act is not in its substantive criteria for resolving disputed relocations but in its process requirements. See infra Part III.

81 Bartlett, supra note 59, at 473.

82 AAML Proposed Model Relocation Act, supra note 33, § 405 cmt.

83 Professor Wexler has suggested that any standard other than endangerment of the child (or variations such as substantial harm or significant harm) may be unconstitutional, noting the Supreme Court's famous aside in Quilloin v. Walcott, 434 U.S. 246 (1977).

We have little doubt that the Due Process Clause would be offended "[i]f the State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in their children's best interest."

Id. at 255 (quoting Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring)). Wexler notes that once the initial custody decision has been reached, a new family unit exists and the rights and obligations of both parents have shifted. Consequently, the state should be precluded, even upon the request of the other parent, from intervening and re-inquiring, absent some allegation of imminent risk for the child. Wexler, supra note 12, at 814–16.

Of course, the critical, unilluminated term in the Supreme Court's dicta is "natural family." See Quilloin, 434 U.S. at 255.
upon the child's interests vis-a-vis the parents' preferences, the
court does not review a proposed relocation unless one of the
parents objects. Thus, what is really happening is the court is
aligning itself with one parent's preference.

B. The Moving Parent's Lesser Burden: Good Faith

Some states have extracted from the cluster of factors
contained in subparagraphs (5)-(7) of the Model Relocation Act
those that are relevant to an assessment of the motivation of the
relocating parent and promoted this consideration as the
exclusive test for judicial ratification of the proposed change.

In these jurisdictions, if the relocating parent is found to be
motivated by good faith, then the court further inquires into the
effect of the proposed move upon the child, and the burden of
proving that the move is not in the child's best interests shifts to
the objecting parent. Conversely, if the relocating parent is
found to be acting vindictively to thwart access—that is, in bad
faith—then relocation is denied. This is a cognate of the
"friendly parent" criterion popularized in legislation in the
1980s, typically expressed as a requirement for the court to
consider "[t]he willingness and ability of each parent to facilitate
and encourage a close and continuing relationship between the
other parent and the child." There are numerous studies
indicating that a child's postdivorce adjustment is enhanced
when each parent supports and encourages the relationship with
the other and when the parents' relationship is civil, even if not
"friendly." Thus the motivation of the relocating parent is
surely relevant and might as well be justified, as some states
insist, as a prerequisite for court approval of the move.

\[84\] See, e.g., Ireland v. Ireland, 717 A.2d 676, 682 (Conn. 1998) (determining
that, in Connecticut, when burden on the moving parent to prove good faith is met,
burden then shifts to non-relocating parent to show the move is not in best interest
of the child); Tomasko v. Dubuc, 761 A.2d 407, 409 (N.H. 2000) (applying
Connecticut's Ireland Rule); see also MINN. STAT. ANN. § 518.175(3) (West 2001);
Farnsworth v. Farnsworth, 597 N.W.2d 592, 598 (Neb. 1999) (noting that if the
relocating parent's motives are legitimate, the court should consider the motives of
each parent in proposing or resisting the move in its analysis of the child's best
interest).

\[85\] OR. REV. STAT. § 107.137(1)(f)(1998); see also LA. CIV. CODE ANN. art. 134
(West 2002) (expressing very similar language).

\[86\] See, e.g., Joan B. Kelly, The Determination of Child Custody, 4 FUTURE OF
CHILD 121, 131–32 (1994).

\[87\] In addition, some states like Maryland, though employing a best interests
The central problem with such a doctrinal stance is that the case law and statutes rarely cabin the good faith concept, leaving open the possibility that reasonable judges may differ in their evaluations. This standard, furthermore, is even more amorphous than the ubiquitous “best interests” formulation and is preoccupied with the parent’s motivation rather than by a holistic view of the impact of the move upon the child.

Dr. Judith Wallerstein, who is a clinical psychologist, divorce expert, amica curiae, and Oprah guru, includes on her list of good motives: occupational, educational, or “other opportunities that will enhance the quality of life of the relocating child, as well as the parent.” She also offers some amplification of what is encompassed by bad faith: moves that are “frivolous or advanced out of anger or a desire for revenge that is calculated to prevent or substantially diminish a child’s contact with the other parent.”

Her listing encompasses the reasons for relocation that have been reflected in reported litigation. Yet, as those cases illustrate, distinguishing between acceptable and unacceptable reasons or even discerning the “real” underlying reason for a proposed relocation is not a clear call. One clinician has noted that some relocating parents may not themselves accurately

test, are heavily predisposed against relocation when there is evidence that the parent previously denied visitation and was unwilling to foster a relationship between the child and the other parent. See Braun v. Headley, 750 A.2d 624, 633–34 (Md. Ct. Spec. App. 2000).

88 Wallerstein and her various co-authors have published many articles and three books that followed a sample of divorcing families in California after their divorce. See WALLERSTEIN & KELLY, supra note 71 (reporting a five-year study); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1989) (discussing a ten-year study); WALLERSTEIN ET AL., supra note 71 (reporting a twenty-five year review).

89 Wallerstein co-authored an amica curiae brief that was filed for the California Supreme Court’s consideration of its most famous relocation case, In re Marriage of Burgess, 913 P.2d 473 (Cal. 1996). Brief of Amicus Curiae Tony J. Janke & Judith S. Wallerstein, In re Marriage of Burgess, 913 P.2d 473 (Cal. 1996); see also Judith S Wallerstein & Tony J. Tanke, To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce, 30 Fam. L.Q. 305 (1996) (recapitulating the brief).


92 Id.
perceive why they desire to move.\textsuperscript{93} Another clinician has observed that the stated beneficial reason may obscure an underlying pathology: a person can move to be with extended family due to "pathological dependency on family members." The moving parent may have "personality problems that interfere with the parent's ability to adjust to a particular environment, with the associated fantasy that change of location will somehow result in more gratifying personal relationships."\textsuperscript{94} The real reason can be masked; finding a better job may be secondary to the parent's true intent of "diluting the strength of the child's relationship with the other parent."\textsuperscript{95} Of course, like all decisions, the motives of the moving parent may be mixed.

In addition to the difficulties of accurate characterization, some trial lawyers point to the interactive quality of divorced parents' behaviors in which cause, effect, and comparative rectitude often blur: "In real life, these parents are in a custody dispute. They're at war . . . . How do you determine who's more at war than the other?"\textsuperscript{96} More troubling is the criticism that the availability of the "friendliness" bonus deters some parents from fully litigating the merits of the custody dispute. Legitimate concerns can be pocketed for fear of appearing hostile or critical of the other parent's worth.\textsuperscript{97}

These concerns bring added unease when the motivation of the moving parent is the pivotal issue used in the calculus to resolve relocation. Though well intentioned, the good faith standard is pockmarked by vagueness and the illusion of accurate factfinding.

C. The New ALI Proposal Presumption Favoring Good Faith Relocation

For initial custody determinations upon divorce, the reform proposal of the American Law Institute (ALI) substitutes the

\textsuperscript{97} \textit{Id.}
best interests rule with the principle of approximation; that is, the trial court is to attempt to preserve the relative pre-divorce caretaking responsibilities of each parent and approximate that time sharing ratio in post-divorce orders.\textsuperscript{98} The ALI reform proposal also provides a multi-layered framework specifically tailored for determining issues of relocation and adjustment of access rights.\textsuperscript{99} Though the redactors do not use terms like “legal custodian,” “joint custody,” or “presumptions”, the proposal operates remarkably like the California rule announced in \textit{In re Marriage of Burgess}\textsuperscript{100} If the legal custodian, the parent with significant custodial responsibility, seeks to relocate, there is a strong presumption favoring the move. In contrast, if the parents have joint custody, then the wisdom of the move is resolved by using the best interests of the child test.

As noted above, if the relocating parent is the one who has been “exercising a significant majority of the custodial responsibility” and he shows that the relocation is in good faith and for a valid purpose,” then the move should be allowed if to a location that is “reasonable in light of the purpose.”\textsuperscript{101} The model gives some amplification about the meaning of good faith: a move “for a legitimate purpose and to a location that is reasonable in light of the purpose.”\textsuperscript{102} The usual examples of reasons for the move are prima facie legitimate,\textsuperscript{103} and a less common purpose

\textsuperscript{98} See ALI Proposal, supra note 30, § 2.08, at 354; Elizabeth S. Scott, \textit{Pluralism, Parental Preference, and Child Custody}, 80 CAL. L. REV. 615, 630–43. (1992). The ALI Reporter, Professor Katharine Bartlett, acknowledges that Scott's thesis served as the basis for the proposed ALI model. See Bartlett, supra note 59, at 478 n.24. See generally Robert F. Kelly & Shawn L. Ward, \textit{FAM. CT. REV.} (forthcoming 2003) (analyzing the approximation principle in light of social science research). In the context of relocation, approximation is used only to revise the “parenting plan,” the terms and conditions of custody and access.

\textsuperscript{99} ALI Proposal, supra note 30, § 2.17, at 354.

\textsuperscript{100} 913 P.2d 473, 478, 483 n.12 (Cal. 1996). The parent entitled to the legal custody of the child has the authority to change the child's residence so long as the move does not cause the child detriment. If the parents have joint physical custody, a proposed move by one requires a de novo determination of custody. \textit{Id.}

\textsuperscript{101} ALI Proposal, supra note 30, § 2.17(4)(a).

\textsuperscript{102} \textit{Id.}

\textsuperscript{103} The listing of § 2.17(4)(a)(ii) explicitly recognizes six valid purposes: to be close to support networks, to respond to significant health concerns, to protect the safety of the child or household members from significant risk of harm, to pursue significant employment or educational opportunity, or to be with one's spouse or perhaps a spouse equivalent, or to improve quality of life. \textit{See supra} text accompanying notes 35–44 (noting the typical purposes that are reflected by decisions).
can be specially justified by the relocating parent. For any of these justifications, the reasonableness of the move is presumed unless the other parent shows that the same purpose could be achieved, or is substantially achievable, by choosing a less disruptive alternative.\(^{104}\)

Thus, so long as the proposal has a ring of reasonableness, for example, displaying some investigation and sensible judgment by the would-be moving parent, especially for a categorical reason, there is no room for disputing the custodian’s good faith. A relatively strong case of a mother’s attempt to freeze the father out of a sustained relationship with his son, similar to the case presented in *Hentz v. Hentz*,\(^{105}\) would be decided differently if North Dakota applied the ALI model. There the father’s proof fell within the approximation principle embraced by the ALI: during the divorce proceedings the mother had unreasonably withheld contact between the father and their young son. Finding that such misconduct had prognostic value for her future behavior after her proposed move to Montana, the North Dakota Supreme Court denied relocation.

The preclusion of claims that the relocating parent may be acting maliciously, vengefully, or selfishly is a hidden cost to the ALI proposal’s limited concept of “good faith.” Nevertheless, the diminution of litigation about its meaning may be worth the cost.\(^{106}\)

A slightly more complicated determination is the required finding of whether an individual enjoys “the clear majority of custodial responsibility.” In the words of the Reporter:

> Whether the custodial responsibility a parent has been exercising constitutes a clear majority of custodial responsibility is determined by a uniform rule of statewide application. The amount set by such a rule should be sufficient to identify those circumstances in which an impairment of the relationship between the child and the parent having the most custodial time with the child can be reasonably assumed to be more detrimental to the child than the impairment of the relationship between the child and the other parent. A simple majority of 51% is not enough to trigger the substantial latitude

\(^{104}\) Id.

\(^{105}\) 624 N.W.2d 694, 698 (N.D. 2001).

\(^{106}\) As argued in the next section, a better approach to redressing parental acrimony and vengefulness may be through notice, education, and mediation rather than by a substantive rule of custody. See infra Part IV.
this section extends to the relocating parent. A percentage between 60 and 70 percent falls within a reasonable threshold range.  

In other words, the ALI rule measures the strength of a parent-child relationship and the consequent harm caused by its disruption based exclusively on the length of time that the parent and child have shared a home in the past. Unlike the primary caretaker standard debated but rejected now by all states, the ALI proposal substitutes a flat time calculation for the more traditional qualitative measures such as an assessment of the caretaking duties each parent performed. A qualitative evaluation of the respective parental roles in the child’s life, using the best interests standard, is appropriate only when neither parent has acted as the child’s primary or predominant custodian.

The strength of this approach, like in states that employ a presumption in favor of the child’s custodian, is that it produces more determinate results than does the dog-eared best interests test. It recognizes that disruption and reallocation are inherent in any proposed relocation and seeks to minimize the harm to the nonmoving parent: “[I]f practical, the court should revise the parenting plan so as to both accommodate the relocation without changing the proportion of custodial responsibility each parent is exercising.” In most relocations, “approximating” the timeshares previously enjoyed will be impossible, at least in terms of frequency, though the overall use percentage may be preserved. It is like converting a one weekend per month time share of a beach cottage into a one month per year arrangement. So, too, the ALI proposal creates prima facie categories of justified or “valid purposes” for a move, thus narrowing the permissible scope of the other parent’s challenge.

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109 ALI Proposal, supra note 30, § 2.17(4)(c).

110 Id. § 2.17(3).
Any ALI proposal certainly carries considerable influence. Furthermore, the relocation model does not stray far from accepted principles. In other words, the concept of a quantitative test for the identification of the primary caretaker has been used *sub silentio* by jurisdictions for some time. The ALI proposal is simply more explicit and blunt. A drawback of the proposal is that the level of past parental involvement with the child is not necessarily a valid determining factor of the level of commitment of either parent after relocation. Furthermore, the retention of the best interests test offers only uncertainty and litigation for those parents sharing similar portions of caretaking time.

D. The Objecting Parent’s Burden: Relocation Endangers the Child and Lacks Mitigating Benefits

Finally, the rule that is most narrowly drawn is that proposed by the 1970 Uniform Marriage and Divorce Act (UMDA). The UMDA does not single out relocation as a change of circumstances warranting the formulation of a special rule, but instead, relocation decisions are governed by the general principle enunciated in Section 409(b):

[T]he court shall retain the custodian appointed pursuant to the prior decree unless . . . (3) the child’s present environment [or environment of proposed relocation] endangers seriously his physical mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him.

In this formulation, the key word “environment” encompasses both physical surroundings and legal arrangements for custody. The presumption is similarly hidden: relocation is permitted and presumed beneficial unless the custodian’s decision will endanger the child.

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111 For example, Louisiana establishes a presumption for joint custody; however, the domiciliary parent (the parent with whom the child primarily resides) “shall have authority to make all decisions affecting the child unless an implementation order provides otherwise.” LA. REV. STAT. ANN. § 9:335(B)(3) (2000).


114 *Id.* § 409(b). The first two exceptions discard situations in which the custodian agrees to the modification or has acquiesced to a de facto change which is now before the court.
Colorado is an example of a state that has explicitly extended the UMDA standard of endangerment to the child as a basis for all modifications, including proposed relocation. The sturdiness of the Colorado rule favoring the custodial parent is illustrated by In re Marriage of Steving, in which a proposed move was affirmed even though there was evidence that the custodian mother had undermined the father's relationship with the child. More cautiously, Tennessee grants a “preference” to the relocating primary domiciliary custodian. The objecting parent nevertheless is limited to proof that the move is vindictive, unreasonable, or poses a “threat of specific and serious harm to the child.”

One of the more intriguing contributions of the UMDA standard, as applied by states to relocation, is the assumption that the nonmoving parent could show that any move is at least risky and may even constitute serious harm for the child, at least over the short run, but that is not enough. Expert testimony that the proposed relocation would inflict a second “loss” upon the child, moving from extended family, friendship group, and neighborhood does not go beyond the obvious. For example, Ohio quite properly requires a showing of actual harm that “must transcend the normal and expected problems of adjustment.” A heavier burden of proof is required, and the issue is refocused on taking a long-term view.

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119 Rohrbaugh, 737 N.E.2d at 556.
The UMDA model's proof of benefit may be criticized because it is limited to a proof of benefit to the child. There is now a considerable body of social science literature that would indicate that the benefit inquiry is more properly extended to encompass the members of the child's custodial family as well. Beginning with an influential New Jersey case, *D'Onofrio v. D'Onofrio*, several states have recognized what is termed a “unity of interests” between the child and primary custodian. As the Massachusetts Court of Appeals explained, the consideration of relocation requests must be grounded on the realization that after a divorce there are two new family units:

The new family unit consists only of the children and the custodial parent, and what is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interests of the children. It is in the context of what is best for that family unit that the precise nature and terms of visitation and changes in visitation by the noncustodial parent must be considered.

The unity of interests concept actually mirrors prevailing social theory much better than the best interests of the child notion. Beginning in the 1960s, clinical psychology and psychiatry shifted to family systems theory. Instead of focusing exclusively on the patient, as is true for the medical model, which calls for the examination, diagnosis, and treatment of the pathology solely in the individual, therapists broadened their analysis to note interactions and relationships between the patient and family members. Family systems theory, though immensely complex, posits understanding of needs and

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123 The term, which came into use in the late 1960s, grew out of Bowen's study of relationship patterns in families with schizophrenia in 1950s and 1960s. See generally MURRAY BOWEN, FAMILY THERAPY IN CLINICAL PRACTICE (1978) (a definitive sourcebook for the family systems theory); DANIEL V. PAPERO, BOWEN FAMILY SYSTEMS THEORY (1990).
behaviors of any individual on the emotional dynamics of the family system. As the needs and behaviors of one member change, others in the family system are invariably affected.\textsuperscript{124}

The four rules that dominate American relocation law span the spectrum from the open and indeterminate to the best interest of the child inquiry to the narrow consideration of whether the move will create substantial harm to the child above that caused by adjusting to a new area. None of the rules is a perfect solution to the relocation problem. Which is the least worst alternative for most children and families?

III. THE LEAST DETRIMENTAL ALTERNATIVE\textsuperscript{125} RULE

A. Reducing Litigation: Isolating the Risk

As will be discussed in greater detail later, the major risk of harm to the child in a relocation dispute is the loss or significant dilution of a parental relationship. That is the risk that should be taken into account in any substantive rule aimed at protecting the child. It is not the destabilization that is common to any move or the child's predictable hostility to environmental dislocation, though both elements certainly cloud the dispute. Post-divorce relocation has not been as intensively studied as divorce, but at least on first learning of the possibility, a child's views about relocation are quite predictable. Children at rest tend to like to remain at rest in the comfort of familiar surroundings and family relationships. Change is unsettling, literally and psychologically. For example, a relocating parent can predict that school age children will oppose any relocation and perhaps become adamant if their resistance is encouraged by the other parent. Older adolescents clearly have the power to sabotage any move, if they fail to re-acclimate to a new community and social group.\textsuperscript{126}

\textsuperscript{124} See generally Wayne Regina, Bowen Systems Theory and Mediation, 18 MEDIATION Q. 111 (2000) (providing an intriguing analysis of family systems theory as a basis for mediation of disputes); see infra text accompanying notes 185–194.

\textsuperscript{125} Reflecting the impossibility of finding any perfect rule, Goldstein, Freud, and Solnit coined this characterization of modern custody rules. See GOLDSTEIN ET AL., supra note 28.


[O]nce a child reaches the age of 14, [West Virginia] permit[s] the child to
The data from national studies\textsuperscript{127} reveal that not all non-custodians remain actively engaged in relationships with their children. From a national sample taken in 1987-88, nearly thirty percent of relocated children had not seen the noncustodial parent at all during the past year, and nearly sixty percent had contact "several times or less." Only about twenty-five percent saw their noncustodial parent weekly.\textsuperscript{128} Furthermore, earlier samples showed even less contact between the noncustodial parent and their children.\textsuperscript{129} If the noncustodial parent is not actively pursuing a relationship with the child, it is difficult to see why the custodial parent's decision about residence and family welfare ought not be free from all but the most serious allegations that the child would suffer substantial harm if the relocation were not enjoined. By focusing upon a parent's actual exercise of parental responsibilities, the ALI principles certainly suggest agreement with this principle, although not as clearly as one might hope.\textsuperscript{130} Consequently, in families in which there is only an inchoate relationship between a child and the noncustodial parent, the parent ought to be able to relocate, subject only to an extremely

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\textsuperscript{128} \textit{Id.} at 85.
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\textsuperscript{129} See Frank Furstenberg et al., The Life Course of Children of Divorce: Marital Disruption and Parental Contact, 48 AM. SOC. REV. 656 (1983). Only 17\% of the children enjoyed contact at least once a week with their fathers. \textit{Id.} at 663.
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\textsuperscript{130} ALI Proposal, supra note 30, § 2.17(1) ("The relocation of a parent constitutes a substantial change in circumstances under § 2.15(1) only when the relocation significantly impairs either parent's ability to exercise responsibilities that the parent has been exercising or attempting to exercise under the parenting plan.").
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The Reporter's Comments underscore the requirement that actual exercise ought to be the key rather than whatever amount of access was established by an earlier judgment: "A parent may not establish substantially changed circumstances on the basis of a prior allocation of custodial responsibility [that] the parent has not actually been exercising or attempting to exercise." \textit{Id.} cmt. b. at 343.
strong showing by the other, inactive parent of substantial harm to the child from the relocation. In this instance, the parent objecting to the relocation would be required to carry the burden of proof to halt the move, perhaps even by clear and convincing evidence.

B. Reducing Litigation: Minimizing Harm to the Child

For the smaller pool of controversies that remain and cannot be settled by the parents, the least detrimental substantive rule is determined using two principal criteria: first, which rule encourages negotiation and discourages litigation, and second, which rule diminishes the five major stressors for children of separated parents? There is no perfect rule. Nonetheless, the choice is unavoidable and the social goal for deciding all issues of child custody, including relocation of the child, should be aimed at optimizing the potential for future collaborative parenting. The state and its trial courts have both the authority and responsibility to assist the members of the former unitary family in their transition to successful parenting partnerships in a binuclear family.131 As the Washington Supreme Court acknowledged,

[T]he practical result of a marriage dissolution is that parenting and family life will not be the same after dissolution. This is so even though a trial court may believe it is in the “best interests of the child” to continue to live in the same family unit. A child cannot escape the reality that his or her family is no longer the same. The trial court does not have the responsibility or the authority or the ability to create ideal circumstances for the family.132

The five sources of stress that expose children of divorced parents to the greatest amount of psychological risk are all potentially present when relocation is contested: continued conflict and hostility between the parents, a decline in economic

131 Ahrons uses the term “binuclear family” to describe the mitotic effect of divorce. See generally CONSTANCE AHRRONS, THE GOOD DIVORCE: KEEPING YOUR FAMILY TOGETHER WHEN YOUR MARRIAGE COMES APART (1995). In the two households, the child may interact as a family member with grandparents and other members of her extended biological families as well as new stepparents, stepsiblings, step-grandparents, and half-siblings.

132 In re Marriage of Littlefield, 940 P.2d 1362, 1371 (Wash. 1997). This case is superceded by statute. See In re Marriage of Grigsby, 57 P.3d 1166 (Wash. 2002).
circumstances, fear of abandonment by one or both parents, the diminished capacity of one or both parents to respond to the child's needs, and diminished contact with familiar sources of psychosocial support and familiar living settings. A sixth stressor, the remarriage of the relocating parent, often accompanies the move. Although social scientists disagree about the relative importance of these risk factors, there is a consensus within the scientific community that these factors ought to be the major concerns in fashioning any child custody policy.

The overwhelming demonstration of child harm due to parental hostility justifies its being treated as the most dangerous risk to the child and the binuclear family. Divorce

133 Although the custodian mother can increase family means upon relocation, a lower standard of living is clearly experienced by many mothers who are custodians of children. Many researchers have listed this consideration as a significant predictor of risk of children's post-divorce maladjustment. See Wallerstein & Tanke, supra note 89, at 310; see also Michael E. Lamb et al., The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment, 35 Fam. & Conciliation Cts. Rev. 393, 394–95 (1997). This article is especially persuasive since it reflects the consensus of conclusion reached by a distinguished group of American experts from the fields of developmental and clinical psychology, sociology, social work, and law. In a previous meta-analysis of extant research, Booth and Amato found that it was not a primary determinant of negative impact of divorce upon children. See Alan Booth & Paul Amato, Divorce, Residential Change, and Stress, 18 J. Divorce & Remarriage 205 (1992).

134 See Lamb et al., supra note 133, at 395.

135 See, Lamb et al., supra note 133, at 103 (noting the need for further research).

136 Compare Wallerstein & Tanke, supra note 89, at 310–11 (emphasizing research that the preeminent predictor for children's well-being was the well-being of the custodial parent), with Warshak, supra note 95, at 89–95 (emphasizing research finding that maintaining a strong relationship with the noncustodial parent was critical to children's post-divorce adjustment).


138 In a widely cited early study comparing the effects of conflict in both intact and divorced families, it was shown that children were dramatically affected by the hostility in which they were enmeshed. Children from high-conflict intact families exhibited lower self-esteem and experienced greater maladjustments than those in divorced families or from low-conflict intact families. See E. Mavis Hetherington et al., Effects of Divorce on Parents and Children, in Nontraditional Families: Parenting and Child Development 233–288 (Michael E. Lamb ed., 1982). See generally Janet R. Johnson, High Conflict Divorce, 4 The Future of the Children 165, 176 (1994). It is possible that litigation may be cathartic. See Wexler, supra note 12, at 791–92. Litigation may offer a safer, healthier battlefield than self-help
is not per se harmful for children; it is not the structure of a child’s family that causes the harm, but continuing and often escalating conflict between the separated parents. The Schwartz war,\textsuperscript{139} which was waged in Nevada, a jurisdiction that apparently still requires a relocating custodian to prove both actual advantage from the move and that the move is in the best interests of the child, is an illustration. The trial court noted thirty-five different court appearances by the parents and “expressed dismay that the parents were ‘ambushing’ each other through the courts ‘without really beginning to realize the detrimental effect on the children.’”\textsuperscript{140}

Considerable evidence now exists that children living in conflicting two-parent families are worse adjusted than children living in well-functioning, single-parent families.\textsuperscript{141} Conflicts between the parents, each claiming to be better than the other, can turn into crippling loyalty competitions, at least as the child perceives the tension in a typical egocentric manner. Wallerstein and Kelly summarized the study of families five years after divorce:

> Often the conflict is exacerbated by parents and, indeed, two-thirds of the parents openly competed for the children’s love and allegiance. . . . School age children particularly appeared to conceptualize the divorce as a struggle in which each participant demanded one’s primary loyalty, and this conception greatly increased the conflict and unhappiness of the child.\textsuperscript{142}

These data counsel that the choice of substantive rule ought to be one that minimizes the possibility of toxic litigation. Thus, we should prefer rules that create greater certainty through the use of presumptions and narrow windows of rebuttal.

The prospect of diminished contact with an extended psychosocial network and loss of a familiar environment certainly seems to weigh heavily in favor of a rule disfavoring relocation. Children are typically risk-averse and will be wary of any change.\textsuperscript{143} Despite the complexity of this risk assessment,

\footnotesize{for the adults, but I know of no data that suggest it makes the child better off.}
\textsuperscript{140} Id. at 1273 n.8.
\textsuperscript{141} See Hetherington et al., supra note 138, at 233–85.
\textsuperscript{142} WALLERSTEIN & KELLY, supra note 71, at 49.
\textsuperscript{143} See supra text accompany notes 68–80 (discussing the preferences of children).}
relocation studies have found that environmental readjustment causes stress, but researchers have concluded that there were no long-term negative effects for children, at least those in intact families.\textsuperscript{144} The opportunities presented by the move and family members' attitudes about it, however, confound attempts to assess the impact upon children and reduce any confidence that a presumption disfavoring relocation is per se warranted.

In contrast, decline in economic circumstances is a risk that presumably will be resolved by a presumption favoring relocation. The custodial parent's risk assessment typically leads to the conclusion that relocation will enhance their own as well as their children's lives. This enhancement usually takes the form of an economic benefit either reducing expenses due to a connection with another support network or by an increase in economic wealth.

The other considerations do not clearly incline the balance either way. Fear of abandonment by the non-relocating parent and diminished caretaking capacity of the would-be relocating parent appear to cancel each other out. In the relocation context, concern arises about the impairment of the child's relationship with the non-relocating parent; however, if relocation is denied, the would-be moving parent would perceive a lost opportunity that might diminish his capacity to respond to the child's needs.

Experts have weighed in on both sides of this debate. Some, such as Wallerstein,\textsuperscript{145} rely on clinical findings and empirical research documenting the benefit to the child of supporting the primary caretaker's autonomy, including available opportunities and the benefits from family unity. Others, including Lamb,\textsuperscript{146} point to research that finds significant enhancement of children's well-being based on a number of psychosocial measures when the nonresidential parent is actively engaged in caring for their children by planning and participating in their everyday lives. The carefully worded conclusion of both of the most

\textsuperscript{144} See, e.g., Gindes, supra note 112, at 126–27. Gindes also notes that there are no long-term studies that have specifically examined the impact of relocation by only the residential parent and child away from the home community and from the other parent. \textit{Id.}

\textsuperscript{145} See, e.g., Wallerstein & Tanke, supra note 89.

methodologically sound recent studies is that more frequent contact between a noncustodial parent and child produces better psychosocial adjustments for the children, as long as interparent conflict is not significant. That finding would certainly seem to support a rule denying or diminishing the likelihood of relocation. Research has also documented that, if there is high conflict between the parents, the greater the frequency of contact between the noncustodial parent and the child, the less well children fare. Consequently, the wild cards are the intransigence of the would-be relocating parent. It is their opportunity to cast the costs of any denial of opportunity upon the other parent and the child, and paradoxically, any legal rule that would invite litigation of their competing claims.

The empirical data do not clearly point the way to a rule choice between denying the benefits of relocation to the child's primary caretaker—and possibly to the child—or denying continuation of the child's present significant relationship with the non-relocating parent. On balance, the best solution is to optimize the possibility of the parents themselves negotiating an agreement, rather than resorting to litigation and conflict. Specifically, the optimal rule induces the relocating parent to respond to the needs of the child and the other parent to remain in a renovated, but equally vital, relationship after relocation. Upon an objection filed by the noncustodial parent, the would-be relocating parent must carry a three-fold burden of proof: that counseling and mediation have been attempted in good faith but failed; that the relocating parent has provided a reasonable plan for ensuring and supporting the child's continuing relationship with the other parent, including the sharing of contact costs; and that the direct benefits for the child outweigh the particular harm from the loss of significant, frequent contact enjoyed by the

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147 The Stanford Divorce Study is reported in a variety of sources. See C. M. Buchanan et al., Caught Between Parents: Adolescents' Experience in Divorced Homes, 62 CHILD DEV. 1008 (1991); Eleanor E. Maccoby & Robert H. Mnookin, Dividing the Child: Social and Legal Dilemmas of Custody (1992). The findings of the National Survey of Families and Households are also available in various sources. See Paul R. Amato & Sandra J. Rezac, Contact with Nonresident Parents, Interparental Conflict, and Children's Behavior, 15 J. FAM. ISSUES 191 (1994).

child and the other parent. Placing the burden of proof upon the relocating parent—creating a mild presumption against relocation—seems necessary to induce the dislocating parent to negotiate and to offer sufficient inducements for remodeling the other parent-child relationship.

The question of the amount of impact that a choice of relocation rule would have upon the parent's negotiations and the child's well-being must be addressed because the overwhelming majority of child custody matters are resolved by parental agreement, usually negotiated by lawyers. As Mnookin and Kornhauser proved in their classic article, the substantive rule of law provides the context for private ordering and frames the types and range of bargaining costs. At negotiation, the only tangible benefits to be distributed are time with the child and the expenses of contact and transportation between households. With the institution of mandatory child support guidelines in every state and the enactment of the Uniform Interstate Family Support Act, which greatly facilitates the collection of support when the parents live in different states, opting to exchange money for time becomes considerably less likely.

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149 See Robert H. Mnookin & Lewis Kornhouser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950, 951 (1979); see also Scott, supra note 98, at 643–56 (discussing the interaction between bargaining theory and custody rules). Adoption of any relocation rule will also affect the parties' bargaining at the time of the divorce and initial resolution of the child custody issue. I can see no reason why a custodial parent might not then bind himself not to relocate in exchange for some other equally valuable gain. If in the future he changes his mind and desires to move, he would need to negotiate for the other parent's release or attempt to gain the court's approval for the proposed breach of contract.

150 42 U.S.C. § 667 (2000). The regulations promulgated by the Secretary of Health and Human Services are found in 45 C.F.R. § 302.56 (1993). Of course, there are worrisome data that suggest that the amount and frequency of contact between nonresidential parents and their children may affect payment of child support thus, at a minimum increasing enforcement costs. See Lamb et al., supra note 133, at 397 (concluding there is a "clear association" between the two); see also Warshak, supra note 95, at 94 n.48. However, Wallerstein and Kelly found no correlation between regular contact and full support. WALLERSTEIN & KELLY, supra note 71, at 373–74.


152 Though most child support guidelines permit the parties to settle outside them, there is a presumption that the designated amount is "the proper amount of child support." See, e.g., LA. REV. STAT. ANN. §§ 9:315.1–9:315.47 (West 2000) (income shares model). The court must approve any stipulated deviation. See id. § 9:315.1(D). Because the range of acceptable payments based upon both parents' income is fixed, the court should be more likely to realize a deviation than was true
Relocation unleashes a set of perverse incentives. A rule favoring relocation enables the moving parent to capture all the benefits from the move as well as to externalize a significant fraction of the costs upon the nonmoving parent by failing to take into account her needs for a vibrant, continuing relationship with the child. A relocating parent may be tempted to move to impose new costs upon a loathed ex-spouse. Similarly, a rule that disfavors relocation creates a veto power for the nonmoving parent and a well-known incentive to hold out for a share of the mover's gains. Thus, the nonmoving parent is tempted to strategically contest relocation. Neither rule properly aligns the parents' incentives. Either way, a perverse incentive will arise. One encourages inefficient moves; the other discourages efficient moves that may make both parents and the child better off.\footnote{153}

With non-market commodities like the satisfactions of parenthood and the quality and quantity of parent-child association, what enables us to quantify the family's gains and losses when relocation is proposed? The inability to make a rational choice between relocation presumptions, as economic theory would put it, compels us to seek a process that encourages the parents to resolve the cluster of relocation issues for themselves. Only when the decision to relocate is agreed to jointly by both parties can we have any assurance that the correct, non-perverse decision has been made. Accordingly, the focus of the law must be shifted from framing the choice in terms of presumptions of entitlement toward creating a process that will enhance the likelihood that such consensual resolutions will often result.

Negotiation between uncoupling parents about the terms of the new post-relocation parental partnership should also be encouraged because the child's future well-being depends upon the parents' ability to resolve their differences without litigation, in pre-guidelines practice and, if the proposal is to significantly reduce the higher income earner's obligation, then the court should also be more likely to disapprove the proposed settlement. See Andrew Schepard, Taking Children Seriously: Promoting Cooperative Custody After Divorce, 64 Tex. L. Rev. 687, 722-23 (1985) (noting the difficulties in assessing the fairness of parents' bargaining for support in exchange for access time).

\footnote{153} A problem of this sort has only recently been recognized as intractable when attempting to sort out which party should be granted rights. See generally Richard A. Epstein, Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase, 36 J.L. & Econ. 553 (1993).
self-help, or other forms of warfare. Parental collaboration is in the best interests of the child. The process the state employs in the course of resolving child custody relocation disputes is equally as important and potentially more beneficial, to the child than the formulation of an adjudicative rule. We now shift the assessment of the child's interests from a substantive paradigm—attempting to evaluate whether granting or denying relocation will benefit the child more—to a process paradigm asking what parental decision-making relationship will most benefit the child now and in the future.

IV. THE PROCESS OF RELOCATION RESOLUTION

A. The Process of Separation and Divorce

Every observer of the modern American contested custody lawsuit has decried the expense of battle, the escalation of viciousness, and the war prize of life-long bitterness, even likening it to Armageddon. Despite the terrible losses, nothing seems to change. Just recently, a New York trial court heard ten days of testimony in a relocation case, including three expert evaluators and several hundred pages of exhibits. The four-year old child was “so pulled by the trauma of this contested matrimonial action,” reported the court, that “she recently asked her mother, ‘Who has me today Mommy?’” Furthermore, as Andrew Schepard has observed, there are more subtle costs that often go unreported and unnoticed:

The adversarial process wreaks havoc on many other aspects of the reorganization of a child's life after divorce. In addition to creating conflict in the nuclear family, it also destroys other infrastructures of the child's life such as bonds with relatives. The custody battle often pits two opposing camps in which grandparents, uncles, and aunts actively take sides to enter the fray. Furthermore, the turmoil associated with the custody fight provides a bad model for future behavior for the child. The child learns that a person must turn to an outsider to resolve disputes; a lesson diametrically opposed to the one

156 Id.
learned from the marriage model.\textsuperscript{157}

By assuming the authority and responsibility for regulating marriage and family relationships\textsuperscript{158} and claiming the sole authority to dissolve them,\textsuperscript{159} the state has a responsibility to minimize harm to any child and to assist the parents in reorganizing their lifetime roles as the child’s caretakers. One of the most impressive features of the ALI Proposal is that it acknowledges this public obligation and underscores the need for parent counseling and education.\textsuperscript{160} Obviously, there are limits to the impact any law or rule can have on human behavior.\textsuperscript{161} Short of denying divorce or denying relocation, however, the state can induce good parenting, at least marginally, through rules that infringe less upon fundamental liberties.\textsuperscript{162} It is a very strange feature of modern American law that public debate usually centers around liberalizing or restricting divorce; it rarely considers how divorce might be made better and less burdensome for children if it cannot be avoided. While the state intervenes to protect abused and neglected children in the name of \textit{parens patriae}, the state has not traditionally intervened in a divorce to provide similar protection for the children’s future lives.

The state, having the ability to assist in its families’ status transition, ought to shoulder that responsibility. There are now considerable data demonstrating the terrible costs of the traditional laissez-faire social policy toward divorcing parents and the benefits that might be derived from providing assistance to them. It is estimated that one-fourth to one-third of divorcing parents have considerable difficulty regaining their footing after separation and perhaps one in ten clearly fail to adjust.\textsuperscript{163} The inability to work through the anger, disappointment, and fear of

\begin{footnotes}
\textsuperscript{157} Schepard, supra note 152, at 738–739.
\textsuperscript{160} See ALI Proposal, supra note 30, § 2.07 at 165–71.
\textsuperscript{162} See Scott, supra note 98, at 668–69. Scott might agree that as long as the law encouraged rather than ordered parental behaviors, reformation (vis-a-vis transformation) might be achieved.
\textsuperscript{163} See Lamb et al., supra note 133, at 396.
\end{footnotes}
FAMILY RELOCATION DECISION MAKING

divorce leaves some of this group embittered and actively hostile for many years. This places their children at a much higher risk of psychosocial problems. These high-conflict parents and couples are identified by multiple characteristics: high rates of litigation and re-litigation, high degrees of anger and distrust, intermittent verbal or physical aggression, difficulty focusing on their children’s needs as distinct from their own, and chronic difficulty co-parenting and communicating about their children after divorce. Conflict carries a substantial social price tag.

For those who do adjust to establish well enough to establish the necessary new patterns of co-parenting in binuclear families and interact as a “single head of household” with other adults, the transition may be unnecessarily difficult and long. Social scientists have cautioned that legal divorce—the signing of orders freeing parties to remarry and settling issues of property, support, and custody—is but one stage in psychological divorce, a unique human experience. During that transition, the family members are at risk:

The immediate impact of divorce is to increase stress and distress.... [Sitressed or depressed [caretakers] were most likely to have disrupted practices and consequently their children would exhibit antisocial behaviors, which would then act as a feedback loop. That is, the poor parental discipline would generate child behavioral problems, which would increase parental stress and depression and perpetuate ineffective parenting.

The state’s role in divorce may more appropriately acknowledge that process by assisting the parents and child through at least the earliest stage and preparing them for what lays ahead: the typical two to six year transition from marriage

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164 Id.


166 See generally Shelley V. Brown, Till Death Do Us Part, 58 EMORY MAG. 23 (Oct. 1981); See generally Gindes, supra note 112; Hetherington et al., supra note 138; WALLERSTEIN & KELLY, supra note 71.

167 Gindes, supra note 112, at 142.
Everyone benefits when a former unitary family can successfully transition to a binuclear family. When conflict is reduced and modification and enforcement costs are minimized, benefits flow to members of the new families, to society at large, and to the children and their future families. Specifically, the state should recognize the obligation to provide three types of services to divorcing families: conciliation and counseling services, parenting education, and mediation. These services can be provided through efforts to restructure the process of post-divorce proceedings.

Even if these services are not generally available to all divorcing parents, parenting education and mediation are at no point more critical than in a relocation dispute, with its winner-take-all consequence. As social scientists have cautioned:

The cooperative interaction of the parents is critical to the child's healthy development and peace of mind. The high potential for continued or re-opened conflict, as in the relocation issue, can severely threaten the child's sense of security, confirming a view of the world as an armed camp in which the child can trust no one.

The state should mandate and provide education to all divorcing parents about long distance separation and collaborative parenting. Using relocation as the focus, it should mandate mediation in order to arrange new parenting responsibilities and, more importantly, to teach parents how to accommodate inevitable change and renegotiate parenting arrangements in the future. The state should also begin this process by modeling good parenting in its relocation process, beginning with a statutory notice provision.

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168 See Hetherington et al., supra note 138, at 75 (finding that most divorce effects had subsided by eighteen months post-divorce); WALLERSTEIN & KELLY, supra note 71, at 189–194 (finding considerable restabilization after five years but even after twenty-five years, some persistent effects). Cf. E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR WORSE (2002) (noting that based on her thirty-year study of families, 70% of the adult divorcees are doing well after two years). See generally WALLERSTEIN ET AL., supra note 73.

169 Relocation probably spells the end to hopes for reconciliation, though it should be explored if counseling services are made available. Many parent divorce education programs urge counseling as a helpful extension of support for those parents who need more than information.

170 Wallerstein & Tanke, supra note 89, at 311 (citations omitted).
B. Notice of Relocation and Proposed Accommodation

Moving without notice creates stress, even alarm, about the child’s whereabouts; it engenders distrust and surely an “inflammatory reaction” in most left-behind parents. Disappearance is like the flinging of a gauntlet that can goad even a passive parent into an expensive and deadly duel. If the children have been drawn into a surprise move, they are forced to be allies in a conspiracy against the other parent, with attendant feelings of guilt and shame about their duplicity.

Thus, states should require that a relocating parent give notice before moving. A parent who seeks to protect a child would give notice, and the law should be structured to encourage this behavior. The ALI and AAML proposals and a few American statutes require that the relocating parent inform the noncustodial parent of an impending move in writing and provide the new address where the child will be residing if that information is available. The time periods within which notice must be given vary from thirty days to sixty days before the relocation. Some moves, like employment opportunities, can occur within shorter time periods, and typically there is a proviso for “the most notice practicable under the circumstances.” The usual exception suspends the notice requirement if there is a credible threat of domestic violence if the family’s new residence is disclosed.

173 ALI Proposal, supra note 30, § 2.17(2); AAML Proposed Model Relocation Act, supra note 33, §§ 1–5.
174 This right to information requirement parallels the statutory revision movement in 1980s that explicitly recognized the right of a noncustodial parent to access the child’s medical and school records. See, e.g., IDAHO CODE § 32-717(A) (Michie 1983); LA REV. STAT. § 9:351 (West 2001).
175 For example, California requires at least 45 days notice before any change in residence. CAL. FAM. CODE § 3024 (Deering 1994). The AAML Proposed Model Relocation Act, as enacted in Louisiana, requires 60 days notice of any move that is more than 150 miles from the other parent. LA. REV. STAT. ANN. § 9:355.4(1) (West 1998).
176 ALI Proposal, supra note 30, § 2.17(2). It requires 60 days notice or “the earliest notice practicable under the circumstances.”
177 See ALA. CODE § 30-3-132(b) (1998); HAW. REV. STAT. ANN. § 571-46(9)(C) (1999); ALI Proposal, supra note 30, § 2.17 cmt. c at 359–60. See generally Janet M. Bowermaster, Relocation Custody Disputes Involving Domestic Violence, 46 U. KAN. 2003]
Requiring the parent to file a “damage limitation”\textsuperscript{178} focuses the mind on what lies ahead and the core issues of mitigating the child’s fears about abandonment by the other parent and the disruption of their routines and support network. This requirement provides a demonstration of good faith by the relocating parent and is an invitation to negotiate with the purpose of sustaining a relationship acknowledged as important for the child’s well-being. It also may be an opportunity to discuss the reallocation of support obligations between the parents. Certainly, less support can be a powerful bargaining chip to induce the nonmoving parent to acquiesce without expensive litigation.\textsuperscript{179}

More importantly, the provision of notice should also call for a proposal for revised access arrangements in view of the relocation. This is a deceptively simple requirement. Casting the burden for a proposal for adjustment upon the relocating parent symbolizes her responsibility to mitigate the psychological and financial costs for the other parent and the child and the impact upon their relationship that is due to her decision. It focuses the minds of both parents on the future, rather than the past, and sets the stage for renegotiation of the terms of shared parenting. The relocating parent bears responsibility for the change and for attempting to mitigate the psychological and financial costs for the other parent. Although the frequency of access will be diminished in most moves of significant distance, total parenting time need not be. Furthermore, the quality of the parent-child relationship can remain constant, if not be enhanced.\textsuperscript{180} Longer stays, to compensate for less frequent ones, enable a noncustodial parent to replicate the parenting rhythms of an intact family:

To maintain high quality relationships with their children,
parents need to have sufficiently extensive and regular interaction with them, but the amount of time involved is usually less important than the quality of the interaction it fosters. Time distribution arrangements that ensure the involvement of both parents in important aspects of their children's everyday lives and routines—including bedtime and waking rituals, transitions to and from school, extracurricular and recreational activities—are likely to keep nonresidential parents playing psychologically important and central roles in the lives of their children.\textsuperscript{181}

There is now a consensus among social scientists that it is the quality of the noncustodial parent-child interaction, rather than the quantity of days of companionship, that is important in their bonding.\textsuperscript{182}

Furthermore, new wave web technology offers innovative contact possibilities for making sight and sound access possible on a daily basis. A New Jersey appellate court recently remanded a relocation case for the trial court to reconsider the benefits of Internet visitation to supplement opportunities for physical access.\textsuperscript{183}

C. Education About Parenting After Relocation

Social scientists have gathered a great deal of data about what children need and want during and after their parents' divorce. With that knowledge, both parents may be enabled to anticipate and minimize their children's anxiety and devise a common approach for dealing with their children's distress.

As of 2001, twenty-eight states have state-wide divorce education programs for divorcing parents, and at least seven other states have various pilot programs in selected

\textsuperscript{181} Lamb et al., \textit{supra} note 133, at 400.
\textsuperscript{182} See Paul R. Amato & Joan G. Gilbreth, \textit{Nonresident Fathers and Children's Well-Being: A Meta-Analysis}, 61 J. MARRIAGE & FAM. 557 (1999). Summarizing 67 studies, they found that the quality of the father-child interaction was more important than the frequency of contact. \textit{Id.}; see also \textit{FURSTENBERG & CHERLIN, supra} note 137, at 72. Warshak agrees in principle, although he cites studies finding a correlation between children's success and stronger father-child relationships. Warshak, \textit{supra} note 95, at 92.
communities. Fifteen states require divorcing parents to attend what is typically a four-hour instructional program. The goal of these programs is to make parents more informed about their own needs and adjustments to single parenthood, more alert to the child’s needs in adapting to two separate families, more aware of and attentive to family dynamics, and better prepared to plan strategies for collaborative parenting.

Even if a state has not previously required education for divorcing parents, it should mandate it in contested relocation cases. As Professor Schepard has observed, “Unfortunately, experience and research demonstrate that the overwhelming majority of parents would not attend [an educational program] without strong backing of the court.” Specifically, strategies for reshaping the nonmoving parent’s relationship with the child after relocation can be discussed and addressed. The intuitive appeal of these and all other educational ventures is that the parents can exercise more control over their own behaviors and make the needed modifications to accommodate relocation. Moreover, there are now some formal evaluations of parent education programs that suggest effectiveness in terms of an enhanced appreciation of the impact of divorce upon children and the need for parenting adjustments. Direct consultation, the absence of denigration between parents, low conflict, and facilitating the child’s relationships with parents and their extended families are all associated with successful divorces and

186 Schepard, supra note 185.
187 See Andrew Schepard, Evaluating P.E.A.C.E. (Parent Education and Custody Effectiveness), N.Y. L.J., May 11, 2000, at 3 (noting that parent effectiveness programs can be effective in meeting aspirations).
the minimization of harm to the child.\textsuperscript{189} These positive results of parent education should also reduce many of the difficulties of relocation. The strongest factor predictive of whether a noncustodial parent will remain involved in and committed to a continuing relationship with his children, even more predictive than the frequency of parent-child contact, is the quality of the post-divorce relationship between the parents.\textsuperscript{190} The overarching social policy to be achieved aims to encourage the parents to acknowledge that each has a significant parental role to play that will continue, despite distance, until their deaths or the death of the child.

D. Mediation of the Terms of Relocation Accommodation

The custody literature demonstrates that mediation is a superior process to adversarial negotiation or court-imposed decree in arranging custody, visitation, and other decision making.\textsuperscript{191} Indeed, most states either expressly authorize or mandate mediation for the resolution of caretaking disputes.\textsuperscript{192}

\textsuperscript{189} See generally Hetherington et al., supra note 138.

\textsuperscript{190} See Valarie King, Nonresident Father Involvement and Child Well-being: Can Dads Make a Difference?, 15 J. Fam. Issues 78, 78 (1994); see also Lamb et al., supra note 133.

\textsuperscript{191} See generally Andrew J. Bickerdik, Divorce Adjustment and Mediation: Theoretically Grounded Process Research, 18 Mediation Q. 181 (2000) (same).

\textsuperscript{192} Some states explicitly authorize the use of mediation for the resolution of child custody and visitation disputes. See, e.g., Alaska Stat. § 25.20.080 (Michie
As of 1995, thirty-three states required a good-faith attempt at mediation in child custody disputes, and other states make mediation referrals discretionary for the courts.\textsuperscript{193} As with parent education programs, there is no reason why a similar mediation mandate ought not to be extended to relocation disputes.\textsuperscript{194} Undoubtedly, mediation was little used in the past as a means of resolution because notice was typically given shortly before the planned relocation.\textsuperscript{195} However, with adequate relocation notice provisions, there is no reason why mediation cannot be accomplished as efficiently as litigation. Even if the mediation attempt fails, the parents have probably acquired useful knowledge in framing the issues of controversy and identifying the needs of the child. Mediation is itself a form of parent education and seems well worth any additional time and expense. A consensual process seems clearly preferable to the fang and claw of litigation.

Mediation can be defined as “an informal process in which a neutral third party helps others resolve a dispute or plan a transaction but does not (and ordinarily does not have the power to) impose a solution. . . . The desired result is an agreement suited to the needs of the parties.”\textsuperscript{196} Because mediation ensures a more balanced discussion of alternatives and results in

\textsuperscript{193} Erickson & Ver Steegh, \textit{supra} note 184, at 894.

\textsuperscript{194} Mediation is possible even when the parents do not presently desire a face-to-face meeting nor contemplate such a future encounter, due for example to family violence. Although in the usual custody mediation the parents are in the same room for one or more meetings with the professional mediator, other types of mediations involve “bilateral negotiation”: the mediator moves between the parties who remain apart in separate rooms, though they usually know each other’s identities. \textit{See generally} Charles A. Bethel, \textit{The Use of Separate Sessions in Family Mediation}, 2 \textit{NEGOTIATION J.} 257, (1986).


\textsuperscript{196} LEONARD L. RISKIN & JAMES E. WESTBROOK, \textit{DISPUTE RESOLUTION AND LAWYERS} 4 (1987). In its more familiar guise as a method for resolving present disputes, mediation has been similarly defined by statute as “a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement.” \textit{FLA. STAT. ANN.} §44.1011(2) (West 1998).
agreements which are more resistant to later deadlocked disputes, it seems ideally suited as a process for parents facing the difficult issues of relocating.

Mediation can achieve two primary goals. First, it ensures that any resulting agreement is both knowledgeably and voluntarily confected, which requires that the parents identify and articulate their desires and concerns. Mediation models collaborative decision making, enabling the work of future parenting. The second primary achievement of mediation is that it is more effective than the adversarial or negotiating process for minimizing future conflicts between the mediating parents. Specificall,

Specifically, in their ten-year study of the effects of the mediation for divorcing parents, Pearson and Thoennes found that those who mediate report better spousal communication patterns, a vital skill to long distance collaborative parenting, than those who do not. Other researchers have found that parental conflict is lower for parents who mediated earlier agreements rather than litigating them. Although not a panacea for eliminating all future disputes, mediation does produce greater client satisfaction and less litigation than do court-imposed orders or lawyer-negotiated settlements. If mediation fails, it is a signal to courts that the relationship of the parents is hostile and disobedience of orders and judgments may also occur. Consider the following:

[Child custody adjudication, including relocation decision making, can be likened to] a grade-B western, divided into good guys and bad guys, each of the parties setting out to demonstrate, not that it was in the best interests of the

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197 See generally Joan B. Kelly, Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes, 9 BEHAV. SCI. & L. 387 (1991) (reporting a study finding substantial but short-term effects for mediating couples).
199 See generally Katherine Kitzmann & Robert Emery, Child and Family Coping One Year after Mediated and Litigated Child Custody Disputes, 8 J. FAM. PSYCHOL. 150 (1994).
200 See generally Howard S. Erlanger et al., Participation and Flexibility in Informal Processes: Cautions from the Divorce Context, 21 L. & SOC'Y REV. 585, (1987); Kelly, supra note 86, at 387; WALLERSTEIN & KELLY, supra note 71; Schepard, supra note 152, at 717–18 (reporting more recent unpublished Minnesota data from a study of custody cases). The greatest proportion of cases that return to court for post-judgment modification are those in which the court determined the child's custody plan after a full adversary hearing.
children that their custody be awarded to them, but that it was in their best interests that it not be awarded to the other. . . . . 
What had started out as an inquiry in aid of the best interests of the child thus quickly turned into something that was anything but. In fact, it is hard to imagine anything more injurious to the best interests of the children than the hearing ultimately conducted by the court to determine those best interests, for if there was ever any ray of hope that the parties might join together in common cause for the benefit of their children, in most instances, when the trial was finally concluded, it was extinguished forever.  

Although courts are necessary when parents become deadlocked, empirical findings now are truistic: the best decision makers for the resolution of child custody disputes and relocation controversies are the parents themselves.  
Mediation is reminiscent of the old adage about teaching the skill of fishing rather than giving fish as charity: through mediation, the parents can be taught how to resolve the issues imbedded in relocations, and the reconstituted family can be self-reliant, reducing or eliminating the role of the courts.  
Mediation proposals might be too costly if the present system worked reasonably well. However, litigation relocation disputes in the United States is a costly, burdensome, erratic, and antagonistic process, which leaves thousands of children at risk of having parents who are even more antagonistic toward each other after the judgment.  
Proposals of counseling, parent education, and mediation are naive if the goal is to eliminate all parental disputes over relocation. The more modest aim of this Article is to discourage as much conflict and adversarial litigation as possible through substantive rule choice and offer litigation alternatives to parents who cannot privately resolve their dispute. These proposals are directed at those parents who might be encouraged to collaborate if they realized the importance of cooperation for

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their child and could see options for continued involvement as parents despite geographical distances.

CONCLUSION

American culture today undeniably countenances "more fluid notions of what constitutes a family," yet the law's dominant conceptualization of exclusive parenthood within a nuclear family still affects individual behavior and idealizations. In earlier times, young children were permitted to live with distant relatives or were sent off to boarding schools; few parents feared such change would destroy their relationships with their offspring. But the modern paradigm of the nuclear family that prays together and plays together certainly affects relocation statutes, judicial decision making, and non-custodians who wage war. The paradigm hinders our reimagining relocation as a permissible and probable change which can bring benefit to the child and which, with some creative alternative processes, can be accomplished without denying, terminating, or damaging the relationship between the nonmoving parent and the child. Relocation need not be a win-lose, negative sum, game.

Divorce is not a single event, although the legal system fixes it with the pin of the decree date. The world reinforces that conceptualization of divorce; it is one in a series of boxes to be checked: "single," "married," "widowed," "divorced." Early social science literature fell into the same misconception, seeking to study the reactions of children "to divorce" as if divorce were a

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203 Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1008 (1995). Estimates based on 1980 census figures are that 40% of all American children spend at least some period of their childhood living with families in which one or both biological parents are absent. Bureau of the Census, Current Population Reports, Special Studies Series P-2, No. 380, *Marital Status and Living Arrangements: March 1982*, A5, Table F (Wash. D.C. 1983). From 1970 to 1994, the percentage of White children living in such families more than doubled (10.5%-23.9%), and the percentage of Black children increased by a third (41.5%-66.6%). Statistics for children of Hispanic origin are unavailable for the 1970 census. As of 1994, 36.5% of these children were living with families lacking one or both biological parents. Bureau of the Census, Current Population Reports, P20-484, *Marital Status and Living Arrangements: March 1994*, Fig. 3, x (Wash. D.C. 1996).

single event. Human behaviorists have now documented what anyone who ever experienced divorce already knew: divorce is a process of adjustment, a series of transitional stages through which the principals pass, although a few occasionally become enmeshed and never emerge. Similarly, the post-divorce residence decision made by a custodian of children is not likely to be immutable. Renesting, including relocation, is part of the divorce adjustment process.

Unfortunately, far too many proposed relocations trigger the renewal of parental hostilities.\textsuperscript{205} Thus, it is important that we attempt to encourage new kinds of parent-child connections and bonds over time and spaces. We lack fully completed cultural norms for distanced parent-child relationships, but there is no reason why they cannot be developed, just as we have developed norms for blended families and bicultural adoptions. The goal of family law and its courts is larger and more important than simply laying out the grounds for divorce or attempting to factor the meaning of “the best interests of the child.” That is a role that looks to the past and the present but ignores the future; it is an “as is, where is” philosophy. The family law system, as some reformers have urged, should attempt to improve the future of the family by reducing conflict, providing adequate support, equipping “parties [with] the tools to restructure their lives,” and “enabl[ing] the family to manage its own affairs.”\textsuperscript{206}

Consequently, modern social policy should facilitate the private ordering of all issues emanating from relocation, rather than attempt to ban or resolve relocation by adversarial litigation, except in cases in which mediation attempted in good faith has failed. When litigation is unavoidable, the burden of proof should be on the parent who is creating the disruption; in other words, the relocating parent who proposes to significantly modify the current allocation of parental time with the child. The relocating parent should demonstrate his efforts to mediate, to restructure the parental relationships and the responsibilities, and, if necessary, to persuade the court that the direct benefits

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\item[205] See generally Spitzer, \textit{supra} note 4 and accompanying text.
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to the child brought by the move will outweigh any loss to the child from the reconfiguration of his relationship with the nonmoving parent. In litigation, most parents seeking in good faith to relocate ought to prevail. Most importantly, the proper inquiries are made: could these issues be resolved without adversarial conflict? Has the disruptive parent made all reasonable efforts to sustain the relationship between the child and the other parent? A proposed rule acknowledges the importance to the child of maintaining a vital relationship with both parents by asking if the move will more than compensate the child for the loss of the familiar past ways of interacting with the other parent?

The relationship with that beloved parent need not end, but it will change just as it changes with new work schedules, remarriage, illness, and the maturation of the child. In an era when childhood stretches out for nearly two decades, there are limitless opportunities for parenting, even across separate households as well as across distance. Social policy, reflected in our relocation process, should encourage and assist parents in adapting to inevitable change, respecting the needs of each other, and accommodating their relationships with the child they hold in common.