

Comment,  
**THE CHANGING PATH TO RELOCATION:  
AN UPDATE ON POST-DIVORCE  
RELOCATION ISSUES**

### **Introduction**

The issue of post-divorce relocation is increasingly prevalent in today's mobile society.<sup>1</sup> Post-divorce relocation enters courts when a parent decides to move after a custody decree is set in place. With a growing list of reasons why parents decide to relocate and with jurisdictions slowly moving away from strict standards regarding relocation, the number of such cases entering the courts has expanded. Improved financial status is one reason for relocating.<sup>2</sup> A parent may also choose to move "to pursue educational or employment opportunities, to remarry, to be closer to family, or simply to gain a fresh start."<sup>3</sup> Some parents may even be motivated to move away from their ex-spouse.<sup>4</sup>

In opposition to the move, stands the non-relocating parent who has an interest in maintaining frequent contact with his or her child.<sup>5</sup> For the non-relocating parent, relocation becomes an issue of losing day-to-day participation in the child's activities and life milestones.<sup>6</sup> The non-relocating parent may be deprived of an opportunity to be involved with the child's academic success and extracurricular activities.<sup>7</sup> One view of relocation advocates is a presumption favoring the custodial parent seeking to move.<sup>8</sup> The American Law Institute (ALI) states that a "court

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<sup>1</sup> Dupre v. Dupre, 857 A.2d 242, 245 (R.I. 2004).

<sup>2</sup> Kenneth Waldron, *A Review of Social Science Research on Post Divorce Relocation*, 19 J. AM. ACAD. MATRIM. LAW. 337, 364 (2005) (discussing reasons for post-divorce relocations).

<sup>3</sup> Dupre, 857 A.2d at 248.

<sup>4</sup> Hon. W. Dennis Duggan, *Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation*, 45 FAM. CT. REV. 193, 198 (2007) (discussing reasons for post divorce relocation).

<sup>5</sup> Dupre, 857 A.2d at 245.

<sup>6</sup> Waldron, *supra* note 2, at 337.

<sup>7</sup> Richard A. Warshak, *Social Science and Children's Best Interest in Relocation Cases: Burgess revisited*, 34 FAM L.Q. 83, 98 (2000).

<sup>8</sup> Gary A. Debele, *A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard*, 10 J. AM. ACAD. MATRIM. LAW. 75 (1998).

should allow a parent who has been exercising the clear majority of custodial responsibility to relocate with the child if that parent shows that the relocation is for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose.”<sup>9</sup> Others argue that the ongoing relationship and contact between the non-custodial parent and the child deserves greater weight.<sup>10</sup>

Relocation cases deal mainly with three issues: establishing a presumption for or against the moving party; establishing a burden of proof (which can later be shifted to the contending party); and establishing factors to consider in relocation cases.<sup>11</sup> In 1997, the American Academy of Matrimonial Lawyers proposed a Model Relocation Act enumerating factors for courts to consider in determining relocation disputes.<sup>12</sup> Courts “shall” consider the nature and quality of a child’s relationship with both parents as well as age, preference, emotional and educational needs.<sup>13</sup> Other proposed factors pertain to the likelihood that the non-relocating parent will have viable visitation rights.<sup>14</sup> Courts should also consider reasons for a parent opposing or seeking the relocation, and the relocating parent’s willingness to promote the visitation.<sup>15</sup> Courts may also consider the enhanced quality of life for the child in relocating, and “any other factor affecting the best interest of the child.”<sup>16</sup> Similarly, ALI sets forth model legislation that suggests similar factors but adds “pursu[ing] a significant employment or educational opportunity” and being with one’s “spouse or domestic partner” to its list of factors.<sup>17</sup>

This comment examines recent developments in post-divorce relocation disputes. Part I analyzes the different approaches jurisdictions take when deciding relocation cases; Part II contemplates the effect relocation has on a pre-existing joint

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<sup>9</sup> American Law Institute, Principles of The Law of Family Dissolution § 2.17 (2000) [hereinafter ALI Principles].

<sup>10</sup> Debele, *supra* note 8, at 77.

<sup>11</sup> Duggan, *supra* note 4, at 197.

<sup>12</sup> American Academy of Matrimonial Lawyers Proposed Model Relocation Act, 15 J. AM. ACAD. MATRIM. LAW 1 (1998) [hereinafter AAML Model Act].

<sup>13</sup> *Id.* at § 405 (1), (2), and (4).

<sup>14</sup> *Id.* at § 405 (3).

<sup>15</sup> *Id.* at § 405 (5) and (7).

<sup>16</sup> *Id.* at § 405 (6) and (8).

<sup>17</sup> ALI Principles, *supra* note 10 at § 2.17 (4)(ii).

custody award; Part III compares social science and forensic studies; Part IV addresses the gender debate prevalent in relocation disputes; Part IV discusses the impact of virtual visitation in a court's determination of relocation; and Part V addresses underlying immigration issues.

## I. Charting the Trend in Relocation Disputes

Traditionally, courts were inclined to disfavor relocation.<sup>18</sup> In recent years, a progression towards applying a less restrictive approach in relocation cases has taken a strong hold. Utah, by law, constitutes any move of the child as a "material change of circumstances" upon which the court must schedule a hearing to determine the relocation issue.<sup>19</sup> Some states conclude there is a rebuttable presumption that the best interest of the child is to relocate with the custodial parent.<sup>20</sup> Minnesota, South Dakota and Wisconsin have even created a statutory presumption favoring relocation.<sup>21</sup> Tennessee and North Dakota have found that the happiness and well-being of the custodial parent is crucial and interrelated to the best interest of the child; thus creating a presumption in favor of a custodial parent's move.<sup>22</sup> Some courts choose instead to apply a burden-shifting approach.<sup>23</sup> The initial burden of proof falls on the custodial parent wishing to

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<sup>18</sup> Dupre, 857 A.2d at 248; *see also* Pollock v. Pollock, 889 P.2d 633, 635 (Ariz. Ct. App. 1995) ("We believe that the burden of proof in cases like this should be on the custodial parent who is seeking to move and take the child to another locale.")

<sup>19</sup> UTAH CODE ANN. 30-3-37 (2007).

<sup>20</sup> *Id.*, citing *Jaramillo v. Jaramillo*, 823 P.2d 299, 303 (N.M. 1991).

<sup>21</sup> MIN. STAT. § 518.18(d) (2007) ("If the court has jurisdiction to determine child custody matters, the court shall not modify a prior custody order or a parenting plan provision which specifies the child's primary residence"); S.D. CODIFIED LAWS § 25-5-13 (2008) ("A parent entitled to the custody of a child has the right to change his residence"); WIS. STAT. ANN. § 767.481 (LexisNexis 2007) ("There is a rebuttable presumption that continuing the current allocation of decision making under a legal custody order or continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.")

<sup>22</sup> Sarah L. Gottfried, *Virtual Visitation: The New Wave of Communication Between Children and Non-Custodial Parents in Relocation Cases*, 9 CARDOZO WOMEN'S L.J. 567, 579 (2003) (discussing states favoring presumptions for relocation).

<sup>23</sup> Buares v. Lewis, 770 A.2d 214, 233 (N.J. 2001)

move. He or she must prove that the decision to move is in good faith and will not harm the child.<sup>24</sup> The “burden shifts to the non-relocating parent, once the relocating parent has demonstrated a prima facie case demonstrating a legitimate reason to move.”<sup>25</sup>

Even New York, which has been considered one of the more restrictive jurisdictions, stepped away from its “exceptional circumstances” test<sup>26</sup> with *Tropea v. Tropea* to favor a pure “best interest of the child” approach.<sup>27</sup> In *Tropea*, the court ultimately allowed the mother to relocate two hours from the non-custodial father.<sup>28</sup> Before this decision, the exceptional circumstance test required the custodial parent to “overcome the presumption that the denial of regular and meaningful access to the staying parent was not in the child’s best interest.”<sup>29</sup> Only after exceptional circumstances were established would the court have considered the best interest of the child.

The Arkansas Supreme Court, in *Hollandsworth v. Knyzewski*, held that no longer should a parent be obligated to establish a real advantage from relocating and determined a presumption in favor of the relocating parent.<sup>30</sup> The court also provided factors lower courts should consider in relocation cases such as the reason for relocating, beneficial opportunities to both the parent and the child, and visitation rights for the non-custodial parent.<sup>31</sup>

California first took a more supportive view of a parent’s right to relocate with his or her child but reversed its decision in a later case making standards for relocation less stringent on the opposing party.<sup>32</sup> The California Supreme Court in the case of *In Re Burgess* held that a custodial parent has a presumptive right to relocate.<sup>33</sup> The California Supreme Court, in *In re the Marriage of LaMusga*, subsequently removed the presumptive right

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 230-31.

<sup>26</sup> *Lavane v. Lavane*, 201 A.D.2d 623, 624 (N.Y. App. Div. 1994).

<sup>27</sup> *Tropea v. Tropea*, 87 N.Y.2d 727, 739 (N.Y. 1996).

<sup>28</sup> *Id.*

<sup>29</sup> *Duggan*, *supra* note 4, at 200.

<sup>30</sup> *Hollandsworth v. Knyzewski*, 109 S.W.3d 653, 657 (Ark. 2003).

<sup>31</sup> *Id.* at 659.

<sup>32</sup> *Waldron*, *supra* note 2, at 340.

<sup>33</sup> *In re Marriage of Burgess*, 913 P.2d 473, 476 (Cal. 1996) (In *Burgess* both parents had joint custody. The mother later wanted to move with the chil-

to relocate and held that lower courts could evaluate the impact of the move on children using the best interest of the child standard in lieu of proving detriment to the child.<sup>34</sup>

## II. What Happens to a Joint Custody Awards When One Parent Wants to Relocate?

Increasingly, mothers and fathers jointly share in the care and custody of their child.<sup>35</sup> Joint custody allows both parents to participate in the rights and responsibility for their child with continued contact.<sup>36</sup> Express statutory authority for awarding joint custody exists in forty-one states.<sup>37</sup> Other states allow joint custody where parties agree and the arrangement is best for the child.<sup>38</sup> The definition of joint custody creates two legal rights: physical joint custody and legal joint custody. Joint legal custody means both parents share the authority and responsibility for making important decisions concerning the child's welfare.<sup>39</sup> Joint physical custody means both parents share the responsibility in minor "day-to-day decisions" and share continuous physical custody of the child over an extended time.<sup>40</sup> Although joint physical custody is rare, one example of a joint physical custody framework may schedule the child spending three entire days with one parent during the week and four with the other parent.<sup>41</sup> Socially, joint custody may be interpreted to mean a 50-50

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dren for better job prospects. To overcome the presumptive right to relocation, the father had to show that relocation would be harmful to the child).

<sup>34</sup> Waldron, *supra* note 2, at 337; *see also In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004).

<sup>35</sup> Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747, 1805 (2007).

<sup>36</sup> 2-13 Child Custody and Visitations § 13.01 [2], 13.04[4] (2007) (joint custody also referred to as shared parenting).

<sup>37</sup> *Id.* at § 13.05.

<sup>38</sup> *Id.*

<sup>39</sup> *Pascale v. Pascale*, 660 A.2d 485, 490 (N.J. 1995).

<sup>40</sup> *Id.* ("the import from the voluminous literature on the subject is that "joint physical custody" means that the child lives day in and day out with both parents on a rotating basis. Numerous "parenting times" with a child do not constitute joint physical custody; to constitute joint custody, each parent must exert joint legal and physical custody over the child").

<sup>41</sup> 2-13 Child Custody and Visitations § 13.01 [2].

split in physical custody of the child; however, no state legally requires this.<sup>42</sup>

Statutes allow for joint custody in three situations: if parents agree to the joint custody; as an option for court to apply; or when judicial preferences and presumptions exist.<sup>43</sup> Nebraska, Ohio, and Vermont by statute require parents to agree before a court may order joint custody.<sup>44</sup> Appellate courts of Massachusetts, New York, Oregon, Texas, and Utah interpret their statutes to say that joint custody can only be awarded if parents agree even though the statute does not contain specific language requiring consent.<sup>45</sup> Regardless of the approach taken, courts will subject any joint custody determination to the best interest of the child. Statutes allowing joint custody as an option grant courts the right to award joint custody even if one or both parents object.<sup>46</sup> In *Crider v. Crider*, both parents requested sole custody of their son after filing for divorce predicated on irreconcilable differences.<sup>47</sup> When the Chancery Court found that “although joint custody was not specifically requested, joint custody was in their son’s best interest,” both parties appealed.<sup>48</sup> The Mississippi Supreme Court affirmed the Chancellor’s decision interpreting the statute to mean joint custody can be granted when in the child’s best interest, even if parties have not requested it.<sup>49</sup> Statutes that allocate a preference considered joint custody as the primary option, where as presumption statutes, by law, assume that joint custody is in the best interest of the child.<sup>50</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at § 13.05 [3] .

<sup>44</sup> NEB. REV. STAT. § 42-364 (5) (2007);VT. STAT. ANN. tit. 15,§ 665 (a); see generally 2-13 Child Custody and Visitations Appendix 13.05 (for a summary of state statutes); but see *Kay v. Ludwig*, 686 N.W.2d 619, 629 (Neb. Ct. App. 2004) (The court recognized the trial court may impose an order of joint custody, even when parents don’t agree, if the court first conducts a hearing that specifically finds such an arrangement is in the best interest of the child. However, this does not create a presumption in favor of joint custody).

<sup>45</sup> 2-13 Child Custody and Visitations Appendix 13.05.

<sup>46</sup> *Id.* (states authorizing joint custody as an option are Alaska, Hawaii, Indiana, Kentucky, Maryland, Missouri, New Jersey, North Carolina, Oklahoma, Pennsylvania, Tennessee, Virginia, and Washington).

<sup>47</sup> *Crider v. Crider*, 904 So.2d 142, 143 (Miss. 2005).

<sup>48</sup> *Id.* at 144.

<sup>49</sup> *Id.* at 149.

<sup>50</sup> 2-13 Child and Custody visitation § 13.05.

With joint custody requiring parents to live in close proximity, a decision to relocate inevitably requires modifications of the joint custody. The traditional standard for modification is showing a substantial change of circumstances, which affects the best interest of the child.<sup>51</sup> Under the ALI Principles substantial change in a relocation or proposed relocation occurs “only when the relocation significantly impairs either parent’s ability to exercise responsibilities the parent has been exercising or attempting to exercise under the parenting plan.”<sup>52</sup> ALI, however, does not set a precise formula for what is a significant impairment because factors are too numerous.<sup>53</sup> For example, the amount of custodial responsibility exercised, distance of the move, and alternative visitation arrangements all are relevant factors.<sup>54</sup>

In juxtaposition, some states will not modify a joint custody decree unless the parent requesting modification proves the other parent is endangering the child.<sup>55</sup> For other states, a simple change in circumstance, in the best interest of the child, can suffice for a modification of joint custody.<sup>56</sup> The Rhode Island Supreme Court, in *Dupre v. Dupre*, held the family court improperly applied the “compelling reason” test in denying the mother’s request to relocate the children from Rhode Island to French Polynesia.<sup>57</sup> Initially, both parents were granted joint physical custody of their children, nine and thirteen years old at the time.<sup>58</sup> The Supreme Court remanded the case directing the lower court to evaluate placement of the children in light of what is in their best interest<sup>59</sup>. Maine and Nebraska, for instance, declare relocation by one parent to be a substantial change in an

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<sup>51</sup> Perkins v. Perkins, 747 So.2d 785 (La. App. 1999)

<sup>52</sup> ALI-FAMDISS § 2.17(1) (2000).

<sup>53</sup> *Id.* at § 2.17(1) comment b.

<sup>54</sup> *Id.*

<sup>55</sup> *In re Marriage of Hoodenpyle*, 787 P.2d 326, 328 (Mont. 1990) (mother’s request to modify joint custody was denied for failure to show the father was endangering the children); MONT. CODE ANN. § 40-4-212(i) (2007).

<sup>56</sup> RSMo § 452.410.1(2007); *Russell v. Russell*, 210 S.W.3d 191, 197 (Mo. 2007) (mother’s request for modification of the joint custody award granted).

<sup>57</sup> *Dupre*, 857 A.2d at 245.

<sup>58</sup> *Id.* at 246.

<sup>59</sup> *Id.* at 262.

existing joint custody determination.<sup>60</sup> Missouri courts, apply a four-point test to determine if relocation is appropriate. In Missouri, courts must consider the advantages of relocating for the child and parent, the integrity of the custodial parent's move, the integrity of the non-custodial parent's opposition, and whether realistic possibilities for visitation exist.<sup>61</sup>

In addition, distinguishing between joint legal and physical custody affects a court's decision. For instance, courts have ruled that "mere distance alone does not make joint legal custody unworkable."<sup>62</sup> Modern advances in communication and transportation can help maintain joint custody.<sup>63</sup> Even with modern technology, however, courts occasionally transfer physical custody of the child to the non-moving parent but maintain joint legal custody if it is in the child's best interest.<sup>64</sup> More restrictive courts have prevented the child's move out of state in order to preserve the joint custody rights of the non-moving parent to protect the child's attachment to school, friends and family.<sup>65</sup>

### III. The Role of Social Science in Relocation Cases

The trend toward a less restrictive approach to relocation is influenced by social science studies.<sup>66</sup> In 1996, Judith S. Wallerstein and Tony J. Tanke researched the psychological effects of relocation on children.<sup>67</sup> Wallerstein's Amicus Curiae brief for *In re Burgess* was the first prominent study analyzing relocation. The ultimate conclusion of the study advocated that the best in-

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<sup>60</sup> See MAINE REV. STAT. ANN. § 752(12); see generally *Farnsworth v. Farnsworth*, 597 N.W.2d 592 (Neb. 1999).

<sup>61</sup> *Pokrzywinski v. Pokrzywinski*, 8 S.W.3d 222, 225 (Mo. App. 1999) (mother's request to modify joint custody decree and relocate children was denied).

<sup>62</sup> *Rusin v. Rusin*, 426 N.Y.S.2d 701, 704 (1980) (The court rejected the father's argument that joint custody was no longer feasible once the mother moved to Colorado).

<sup>63</sup> *Deshotels v. Deshotels*, 638 So. 2d 1199, 1201-02 (La. Ct. App. 1994).

<sup>64</sup> See generally *Key v. Key*, 519 So.2d 319 (La. Ct. App. 1988).

<sup>65</sup> *Newell v. Rammage*, 7 S.W.3d 517, 523 (Mo.Ct.App. 1999).

<sup>66</sup> *Dupre*, 857 A.2d at 256.

<sup>67</sup> 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, 306 (1996).



terest of the child is to allow the custodial parent to relocate.<sup>68</sup> The study emphasized the importance of the child's perspective on divorce. According to the research, a significant number of children suffer long term post-divorce residual effects.<sup>69</sup> Post-divorce symptoms that adolescents may face include overly aggressive behavior, depression and even learning difficulties.<sup>70</sup> Although, not directly related to relocation, the authors were able to infer that relocation involves children already facing post-divorce problems. Wallerstein and Tanke also note that separating the child from the custodial parent may also lead to severe psychological problems as well. Prohibiting a child from moving may create psychological disturbances to a custodial parent. The parent's well-being may affect the child through diminished parenting skills.<sup>71</sup>

Although Wallerstein conducted her study over a twenty-five year period and studied 131 post-divorced children from sixty families, she did not quantify her data, which "precluded meaningful statistical comparisons between different families, children, ages and genders."<sup>72</sup> Furthermore, Wallerstein had very little information on relocating children; only six of the families in her study relocated, and Wallerstein had the opportunity to interview only three of these families.<sup>73</sup> On the contrary, Richard Warshak, a clinical and research psychologist, evaluated several social science studies demonstrating the importance of a child's relationship with the non-custodial parent. Warshak criticized Wallerstein's study for ignoring studies and opinions emphasizing the importance of a non-custodial parent remaining close to the child.<sup>74</sup>

A study conducted by Braver, Ellman and Fabricius is the first empirical study on the effects of parent relocation and is the

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<sup>68</sup> Robert Pasahow, *A Critical Analysis of the First Empirical Research Study on Child Relocation*, 19 J. AM. ACAD. MATRIM. LAW. 321, 322-323 (2005).

<sup>69</sup> Wallerstein, *supra* note 66, at 308.

<sup>70</sup> *Id.* at 310.

<sup>71</sup> *Id.* 314.

<sup>72</sup> Pasahow, *supra* note 67, at 322.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

most recent study conducted on post-divorce relocation.<sup>75</sup> The Braver study analyzed 602 questionnaires completed by college students. Of the 602 students, twenty-nine percent came from families with divorce parents. The data from the Braver study found little scientific evidence to sustain a legal presumption supporting in favor of the relocating custodial parent. The Braver study indicated that there should *not* be a burden of proof on the non-custodial parent to establish relocation would be detrimental to the child.<sup>76</sup> However, Braver's data did not provide strong evidence to support the contrary view that allowing the custodial parent to relocate away from the non-custodial parent *is* psychologically detrimental to the child.

It is important to note that these studies focus on situations where one parent is a custodial parent and the other is a non-custodial parent.<sup>77</sup> This leaves the question of what to do in true joint custody situations unanswered. Also, none of the conducted research or studies examines the actual effects of relocation directly but examines divorce situations to extrapolate what might happen in relocation issues.

The length of time between divorce and relocation may have an affect on the child's psychological well-being. Adding the disruption of relocation shortly after a divorce may cause a child to experience mental health problems such as cumulative stress syndrome.<sup>78</sup> The age of the child may also add to the effects of relocation. For instance, children from age five to about ten years of age are at the least risk of disruption issues in relocation cases.<sup>79</sup> Children under the age of five may have difficulties maintaining a strong bond with the non-custodial parent.<sup>80</sup> With children in their early teenage years, relocation poses issues not only between parental relationships but also strains outside support systems of the child such as friends and after-school activities.<sup>81</sup> There are ways to possibly mitigate the detrimental effects of re-

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<sup>75</sup> Stanford L. Braver, et al., *Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations*, 17 J. FAM. PSYCHOL. 206 (2003).

<sup>76</sup> Pasahow, *supra* note 67, at 322.

<sup>77</sup> Waldron, *supra* note 2, at 339.

<sup>78</sup> *Id.* at 347.

<sup>79</sup> *Id.* at 351-52.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

location.<sup>82</sup> For example, a move may be beneficial to a child if the move creates a strong support system for both the parent and the child or when the move increases the socio-economic status of the relocating parent.<sup>83</sup>

William G. Austin, a practicing clinical and forensic psychologist, finds social science studies are overlooking relevant forensic research and evaluations that study the effects of post-divorce relocation on children.<sup>84</sup> Forensic research literature establishes that post-divorce relocation may create long-term behavioral problems for children.<sup>85</sup> Much of the social science research considers the potential harm to the relationship between the child and the non-relocating parent; however, the detriment to the child's health alone needs be considered as well.<sup>86</sup> Representative sample survey studies measure the effects of relocation and school behavior problems, academic success, graduation rates, teen pregnancy and general well-being; literature which is "largely overlooked by social scientists."<sup>87</sup>

#### IV. Genderizing Relocation

Relocation disputes illustrate a skewed perception of the custodial parent most always being the mother and the non-custodial parent as the father. Even now, eighty percent of parents who seek a court-ordered approval to relocate are mothers.<sup>88</sup> Ninety percent of custodial mothers head households after a divorce.<sup>89</sup> Of that ninety percent, seventy-five percent relocated at least once.<sup>90</sup> To best understand gender roles in relocation, it is important to evaluate historical developments in child custody. The colonial period portrayed children as property of the father

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<sup>82</sup> *Id.* at 369.

<sup>83</sup> *Id.* at 370.

<sup>84</sup> William G. Austin, *Relocation, Research, and Forensic Evaluation, Part I: Effects of Residential Mobility on Children of Divorce*, 46 FAM. CT. REV. 137 (2008).

<sup>85</sup> *Id.* (The author reminds readers forensic evaluation models provide only a predictive framework and to be wary of over predictions or interpretations).

<sup>86</sup> *Id.* at 139.

<sup>87</sup> *Id.*

<sup>88</sup> Duggan, *supra* note 4, at 199.

<sup>89</sup> Gottfried, *supra* note 21, at 568.

<sup>90</sup> *Id.*

and provided mothers with no legal rights to the children.<sup>91</sup> However, with the progression of time and the growth of women's rights, the importance of mother's nurturing their children took a strong hold. This historical evolution and the idea of the "tender years" doctrine inevitably affected relocation disputes.<sup>92</sup> Mothers are now viewed as the primary nurturer of the child.<sup>93</sup>

In recent years, fathers have started to protest their genderized role. Studies assessing whether the father-child contact is undervalued argue that a secure father-child relationship is needed for a child's long-term well-being.<sup>94</sup> These studies recommend joint custody awards or liberal visitation rights and urge courts to require custodial mothers to remain in close proximity to the child's father.<sup>95</sup> However, scientific deficiencies link to studies urging the need for father-child contact.<sup>96</sup> For example, an article by Richard Warshak, concluding that an infant's overnight stay with the father is equally important, misquotes the 1999 study by Solomon and George, which found infants remaining overnight with their fathers correlated to a higher rate of disorganization for the child.<sup>97</sup> Several fathers' rights organizations that provide support groups, legal information and guide books, now exist.<sup>98</sup> For example, The Children's Rights Council (CRC), promoting joint custody and fathers' rights, provides an overview of thirty-seven states that currently provide for joint custody as either a presumption or strong preference.

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<sup>91</sup> Debele, *supra* note 9, at 78.

<sup>92</sup> *Id.* at 84-85.

<sup>93</sup> Gottfried, *supra* note 21, at 573.

<sup>94</sup> Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40 FAM. L.Q. 281, 296-97 (1996).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 289.

<sup>97</sup> *Id.*; citing Judith Solomon & Carol George, *Attachment Disorganization, The effects of Attachment of Overnight Visitation in Divorced and Separated Families: A Longitudinal Follow-up* (1999).

<sup>98</sup> American Coalition for Fathers and Children, <http://acfc.convio.net> (last visited April 10, 2008); The Alliance for Non-Custodial Parents Rights, <http://www.ancpr.org> (offers a 250 page guide book discussing child custody issues, cause law and advantages) (last visited April 10, 2008); Dads Rights, <http://dadrights.org> (offers a database of articles pertaining to child custody and a way to submit questions to attorneys in support of father's rights)(last visited April 10, 2008).

Merle H. Weiner, a professor of law at the University of Oregon School of Law, finds the failure of most courts to consider mobility of the non-custodial parent in relocation disputes is an example of “outdated assumptions about gender roles that ossifies gender inequality.”<sup>99</sup> In addition, ignoring a non-custodial parent’s ability to move with a relocating parent effectuates gender stereotypes by fostering different expectations between men and women.<sup>100</sup> Only a handful of jurisdictions consider the non-custodial parent’s ability to relocate as a factor when deciding relocation cases (i.e. New York, Texas, Louisiana, Washington, Florida, and New Jersey).<sup>101</sup> The author concludes that courts and legislatures should address the non-custodial parent’s ability to relocate because such is in the best interest of the child and treats men and women equally in relocation disputes.<sup>102</sup>

A recent decision of the Colorado Supreme Court addresses the need for equal treatment. In *Ciesluk v. Ciesluk*, the Colorado Supreme Court held that the trial court abused its discretion in denying the mother’s request to relocate for Colorado to Arizona.<sup>103</sup> The trial court failed to impose an equal burden on both parents in determining what is best for their child.<sup>104</sup> The court unfairly place a burden on the mother to prove the effect of the move on the father-child relationship and the enhanced opportunities for the child if he relocated with his mother.<sup>105</sup>

## V. Virtual Visitation

The ability to communicate has been revolutionized in relocation cases with the use of virtual visitation technology. Virtual visitation uses techniques such as video conferencing, web cams and other wired technologies to help non-custodial parents stay in constant contact with their children.<sup>106</sup> In 2001, the New Jersey Appellate Court, in *McCoy v. McCoy*, allowed a mother

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<sup>99</sup> Weiner, *supra* note 34, at 1750.

<sup>100</sup> *Id.* at 1751.

<sup>101</sup> *Id.* at 1763; *see also Murnane v. Murnane*, 552 A.2d 194 (N.J. Super. Ct. App. Div. 1989).

<sup>102</sup> Weiner, *supra* note 34, at 1782-83.

<sup>103</sup> *Ciesluk v. Ciesluk*, 2004 WL 2504503 (Colo. Nov. 8, 2004).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Gottfried, *supra* note 21, at 569.

to relocate cross-country by reasoning that the father could communicate with his children through virtual visitation.<sup>107</sup> A Florida circuit court judge, in *Kaleita v. Sniderman*, went as far as ordering the parents to purchase technologically advanced computer systems to allow the child to communicate with her mother.<sup>108</sup> Initially the mother of the ten year old girl was granted primary custody; however, instead of allowing the child to relocate with her mother, the court gave the father primary custody rights and imposed the use of virtual visitation on both parents.<sup>109</sup>

The Nevada Supreme Court, in *McGuinness v. McGuinness*, held that “separation does not preclude each parent from maintaining significant and substantial involvement in a child’s life.”<sup>110</sup> The court found alternative methods of communication such as phone calls, e-mail, letters and frequent visitation were adequate to maintaining a meaningful relationship with a child.<sup>111</sup> By virtue of virtual visitation, a New York court allowed a mother to move with her child from New York to Dhahran, Saudi Arabia, in *Lazarevic v. Fogelquist*.<sup>112</sup> The court required the mother to hire a computer consultant, at her expense, to set up a virtual communication system that would allow the daughter to virtually communicate with her father.<sup>113</sup> With the myriad of advantages that come with virtual visitation, there are inevitably some disadvantages. Transmission may not be perfect, words may lag, and virtual visitation can never be a substitute for “face to face or touch” communication.<sup>114</sup>

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<sup>107</sup> *McCoy v. McCoy*, 764 A.2d 449 (N.J. Sup. Ct. App. Div. 2001); *see also*, Gottfried, *supra* note 21, at 569.

<sup>108</sup> *Kaleita v. Sniderman*, 851 So.2d 212 (Fla. Dist. Ct. App. 2003); *see also*, Gottfried, *supra* note 21, at 569.

<sup>109</sup> *Id.*, *see also*, Gottfried, *supra* note 21, at 569.

<sup>110</sup> *McGuinness v. McGuinness*, 970 P.2d 1074, 1077-78 (Nev. 1998); *see also*, Gottfried, *supra* note 21, at 569.

<sup>111</sup> *Id.*

<sup>112</sup> *Lazarevic v. Fogelquist*, 668 N.Y.S.2d 320 (N.Y. Sup. Ct. 1997).

<sup>113</sup> *Id.* at 328.

<sup>114</sup> Gottfried, *supra* note 21, at 589.

## VI. Immigration Concerns

The increased number of mixed status families and the rapid rise in population of immigrants without legal status forces the issue of immigration to enter family courts. The issue of post-divorce relocation and its effect on immigration has not directly been addressed by family courts, but by comparing the outcome of immigration cases generally entering the court, the outcome looks grim. Some courts flat out refuse to grant custody of a child and ultimately terminate parental rights of an undocumented immigrant because the judge may have a “problem with [a parent’s] INS situation.”<sup>115</sup>

The Fifth and Fourteenth amendments offer due process protection to aliens even if their presence in the United States may be unlawful.<sup>116</sup> This protection, however, lasts only until the undocumented immigrant is voluntarily or involuntarily removed from the United States.<sup>117</sup> With the constant threat of deportation, undocumented immigrants may not have the right to custody, let alone the right to relocate with their child.<sup>118</sup>

With limited freedom and little hope for completing the immigration process or ability to legally work, an undocumented parent in such a situation seems to have questionable rights to relocate within the United States. Perhaps relocating with the child back to the parent’s country of origin may be plausible, but this will most likely be opposed by the non-relocating U.S. parent. Some judges choose to transfer custody of the children from undocumented parent to the U.S. resident regardless of such parent’s lack of communication with the children in the past.<sup>119</sup>

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<sup>115</sup> *In re M.M.*, 587 S.E.2d 825, 831 (Ga. Ct. App. 2003); see also David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11-1 BENDER’S IMMIGR. BULL. 2, 5 (2006).

<sup>116</sup> Thronson, *supra* note 114, at p. 7; citing *U.S. v Carolene Products. Co.*, 304 U.S. 144, 152-53, n.4 (1938).

<sup>117</sup> Thronson, *supra* note 114.

<sup>118</sup> Thronson, *supra* note 114, at p. 11 (In 2002, 148,619 persons were deported from the United States. Of those deported 77,860 were deported for non-criminal violations).

<sup>119</sup> *Id.* at 9.

Some courts may be willing to provide an exception for such cases by “calculate[ing] immigration status into the outcome.”<sup>120</sup> *Velez v. Velez* is one such exception.<sup>121</sup> When the father refused to continue his immigrant petition for the wife, the court refused to grant the divorce in efforts to avoid deportation.<sup>122</sup> In *Velez*, the court ultimately concluded that the best interest of the child was to live in the United States with his mother, regardless of her legal status.<sup>123</sup>

## VII. Conclusion

Evolving mobility in today’s society has desensitized courts toward relocation disputes. Courts are drifting away from stringent views restricting relocation and generally adopting presumptions and preferences in favor of relocation. The influence of social science research has played a significant role in this more accepting view. Technological advances, such as virtual visitation, add to the success of post-divorce relocation; courts not only grant a relocating parent’s wish to move within the country, but also grant relocation requests to move to a different country.

The increased support in relocation awards conflicts with the increased support in joint custody awards. Although joint legal custody may successfully transcend jurisdictional borders, joint physical custody does not. Courts differ on which standards to apply in determining if a modification of a joint custody award is appropriate. Regardless of which approach a court takes, the best interest of the child is always a determinative factor in assessing if whether to maintain joint custody or allow relocation. Gender stereotypes in relocation disputes further fuel the relocation versus joint custody dispute. Mothers generally considered to be the custodial parent, stand in favor of allowing relocation. On the contrary, fathers argue that relocation deprives them of the right to be equally involved in their child’s life and fight to maintain joint custody awards.

Samara Nazir

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<sup>120</sup> *Id.* at 8.

<sup>121</sup> *Velez v. Velez*, 1994 Conn. Super. Lexis 3139 (1994).

<sup>122</sup> *Id.* at 10.

<sup>123</sup> *Id.*