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# Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation

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## INTRODUCTION

Courts often express frustration when adjudicating relocation disputes. These disputes frequently are characterized as zero-sum contests because the parents' positions seem irreconcilable. Courts, scholars, and practitioners articulate the conflict as a contest between the custodial parent's desire to move versus the noncustodial parent's desire to have frequent and continuing contact with the child. As the American Academy of Matrimonial Lawyers ("AAML") stated in the commentary to its model act on relocation:

The child's custodian may have a compelling interest to move with the child; and the noncustodial person may have a compelling competing interest in maintaining the relationship with the child, which may be significantly undermined by the move. The child has a compelling interest in stability — both in the stability of remaining with the custodian and with maintaining frequent contact with the noncustodial parent. In sum, even a perfect list of factors, when applied to decide such a contest, will not resolve the dilemma, i.e., relocation often is a problem seemingly incapable of a satisfactory solution.<sup>1</sup>

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<sup>1</sup> Am. Acad. of Matrimonial Lawyers, *Perspectives on the Relocation of Children*, 10 J. AM. ACAD. MATRIMONIAL LAW. 1, § 405 cmt. (1998) [hereinafter AAML]; see also *Hollandsworth v. Knyzewski*, 109 S.W.3d 653, 657 (Ark. 2003) ("When the noncustodial parent objects to the custodial parent's relocation, a conflict inevitably emerges between the custodial parent, who has the right to travel and to relocate and desires to take the children with him or her, and the noncustodial parent, who wishes to maintain a close relationship with the children and has misgivings that [the] bond will be lost."); *Tropea v. Tropea*, 665 N.E.2d 145, 148 (N.Y. 1996) ("Relocation cases . . . present some of the knottiest and most disturbing problems that our courts are called upon to resolve. In these cases, the interests of a custodial parent who wishes to move away are pitted against those of a noncustodial parent who has a powerful desire to maintain frequent and regular contact with the child. Moreover, the court must weigh the paramount interests of the child, which may or may not be in irreconcilable conflict with those of one or both of the parents."); *Dupre v. Dupre*, 857 A.2d 242, 245 (R.I. 2004) (noting "often irreconcilable tension" between "the desire and right of one parent to move to pursue new opportunities" and "the desire and right of the other parent to maintain a close relationship with his or her child"); *Latimer v. Farmer*, 602 S.E.2d 32, 34 (S.C. 2004) ("Cases involving the relocation of a custodial parent with a minor child bring into direct conflict a custodial parent's freedom to move to another state without permission from the court and the noncustodial parent's right to continue his or her relationship with the child as established before the custodial parent's relocation."); *Hawkes v. Spence*, 878 A.2d 273, 274-75 (Vt. 2005) (describing relocation cases as "seemingly irreconcilable

The law in most states currently clouds courts' ability to find a solution to this dilemma. Despite the various tests employed by courts and legislatures around the country, few jurisdictions inquire into the noncustodial parent's mobility as part of the analysis.<sup>2</sup> Consequently, courts rarely explore the noncustodial parent's ability to relocate with the custodial parent and child; rather, they limit the inquiry to exploring whether visitation can be restructured to account adequately for the change in physical geography. The normative question — whether a noncustodial parent should follow the custodial parent when the custodian wants to move with the child — is rarely, if ever, considered.

Recent reform efforts similarly ignore the noncustodial parent's mobility. Both the American Law Institute ("ALI") and the AAML have crafted model laws. While both groups have succeeded in proposing some novel measures, including the requirement that the noncustodial parent give notice when he or she is moving,<sup>3</sup> both frameworks fail to encourage the noncustodial parent to relocate with the custodial parent and child when that arrangement would be best for the child. This omission is presumably related to both model acts' orientation: parents should be able to go their own ways after divorce.<sup>4</sup>

The lack of attention given to the noncustodial parent's mobility is problematic for a variety of reasons. Most courts assert that they are resolving these disputes according to the "best interest of the child," yet a failure to consider the noncustodial parent's mobility may unnecessarily deprive some children of the best solution in their cases. For some children, the best way to resolve the dispute may be for the custodial parent, child, and noncustodial parent to move together to

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conflicts in which the custodial parent's interest in building a new life with the children is often pitted against the noncustodial parent's interest in maintaining a close relationship with the children").

<sup>2</sup> This Article uses the term "noncustodial parent" to designate the parent who is opposing the relocation, typically the parent who spends less time than the other parent exercising physical care for the child. However, sometimes the person opposing the relocation will share equally the responsibility for physical care. For a discussion of that particular fact pattern, see *infra* text accompanying notes 210-20. This Article does not address the relocation of children by their parents who spend less time exercising physical care for the children than the other parent.

<sup>3</sup> See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.17(2) & cmt. c (2002); AAML, *supra* note 1, § 202.

<sup>4</sup> AM. LAW INST., *supra* note 3, § 2.17 cmt. a; AAML, *supra* note 1, § 202 cmt. ("[L]egal action to interfere with an adult's constitutional right to travel is neither provided nor possible.").

the new location. Simply, if the noncustodial parent also moved, a child could experience the advantages of the move, whatever those advantages might be, and maintain the same relationship with the noncustodial parent without extensive travel.

The failure to consider the noncustodial parent's mobility is also problematic because it rests on outdated assumptions about gender roles and ossifies gender inequality. Courts probably fail to make the noncustodial parent's mobility a routine factor in their analyses because the current framework evolved during a time when women were legally obligated to follow their spouses and men were the breadwinners. At that time, it would have been unimaginable for a man (typically the noncustodial parent) to follow the woman (typically the custodial parent) to a new location. Today, the irrelevance of the noncustodial parent's mobility perpetuates gender stereotypes, fosters different expectations about the responsibilities of men and women to accommodate the other parent, and sustains different degrees of mobility for custodial and noncustodial parents. In short, the status quo is contrary to courts' express commitment to gender equality.

A failure to consider the noncustodial parent's mobility also undermines courts' and legislatures' attempts to encourage cooperative parenting after divorce. Many laws in the custody arena reflect and express this aspiration, including mandatory parenting classes for divorcing couples and "friendly parent" provisions in custody statutes. Yet the law governing relocation lacks a strong emphasis on parenting as "partnership." Rather, the current approach signals that cooperative parenting is not expected and undermines attempts by custodial parents to encourage noncustodial parents to relocate as a solution (if it is even recognized as an option).

Reform seems achievable. The legal tests for adjudicating relocation disputes are varied, but all are relatively flexible. Judges have historically used their considerable discretion in this area to promote various values. At one time, judges used their discretion to allow the parties' gender to guide the relocation decision; today, that same discretion can promote equality and cooperative parenting. States seeking to adopt this Article's approach will be aided by the case law and statutes in a few jurisdictions that already recognize the importance of the noncustodial parent's mobility (most notably New Jersey, New York, Texas, Washington, Louisiana, and Florida).

This Article assumes that some courts (and perhaps legislatures) will be persuaded that relocation analysis must include a consideration of the noncustodial parent's mobility. Therefore, this Article also

examines some of the practical implications of focusing on the noncustodial parent's mobility. What weight should a court attach to the inconvenience or hardship that would attend the noncustodial parent's relocation? Need a court scrutinize the noncustodial parent's motives for resisting relocation? Should a court accommodate a recalcitrant noncustodial parent by restructuring visitation after relocation is approved? Should a court ask the noncustodial parent whether he or she will also relocate if the custodial parent's request is granted? Should the court encourage a parallel relocation by the noncustodial parent when the noncustodial parent poses a safety risk to the parent or child? Each of these questions raises fascinating policy issues.

Once the noncustodial parent's mobility becomes a more central focus of relocation law, the noncustodial parent's mobility might become relevant to a host of other legal issues. For example, custodial parents may use it to bolster their constitutional argument that they have a right to travel. Noncustodial parents may raise constitutional objections of their own if visitation is conditioned on their willingness to move with their children. In addition, other laws that affect custodial parents' mobility may undergo a reevaluation. For example, the Uniform Child Abduction Prevention Act, recently approved by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), encourages courts to impose restrictions on the custodial parent when certain risk factors for child abduction are present. Judges may fashion less restrictive orders when it appears that the noncustodial parent should follow instead of complain. Similarly, the noncustodial parent's mobility may become relevant to criminal prohibitions on child abduction: these often have a mens rea requirement that requires the abductor to interfere intentionally with the other parent's rights. A custodial parent might lack the necessary mens rea if she reasonably expected the noncustodial parent to follow her to the new location. Apart from prompting lawyers and judges to think differently about the application of existing law, attention to the noncustodial parent's mobility may also ignite discussion about new measures that might encourage this sort of mobility, such as policy statements, parenting class curricula, or even taxpayer subsidies.

NCCUSL's recent commission of a Model Relocation of Children Act offers the perfect opportunity for policymakers to elevate the importance of the noncustodial parent's mobility in resolving these disputes. This Article is meant to enrich that policy discussion.

Part I sets the stage for the argument that follows. It briefly describes the law governing relocation disputes, highlights the

importance of “the best interest of the child” to the analysis, details the failure of courts to consider the mobility of the noncustodial parent, and suggests that scholars’ similar failure hurts the quality of the debate over relocation policy. It also identifies the few jurisdictions that recognize the relevance of the noncustodial parent’s mobility, describes the scant attention paid to these jurisdictions’ laws, and explains why that may be the case. Part II discusses the reform efforts of two prominent and well-respected organizations, the AAML and the ALI, and demonstrates the inadequacy of those organizations’ frameworks. Part III sets forth three concerns that justify adoption of the proposed reform (and that already have had a powerful influence on family law): the child’s best interest, equality between men and women, and parenting as partnership. Part IV maps out how courts might incorporate consideration of the noncustodial parent’s mobility into existing doctrinal structures and addresses questions about practicalities. Finally, Part V discusses four possible implications of this proposal. It considers the potential ramifications for constitutional analysis, the Uniform Child Abduction Prevention Act, the federal International Parental Kidnapping Crime Act, and future measures to foster noncustodial parents’ mobility. It concludes by mentioning the opportunity presented by NCCUSL’s Model Relocation of Children Act, which has yet to be drafted.

## I. THE LAW OF RELOCATION DISPUTES

### A. A Brief Overview

Relocation disputes are not new, and the standard by which courts have been resolving them has remained remarkably constant across time and space. Since at least the end of the nineteenth century, courts have stressed that the “child’s best interest” guides their determinations. Over a century ago, for example, the Illinois Court of Appeals affirmed the trial court’s decision in *Chase v. Chase*<sup>5</sup> because the trial court did “what was for the best interests of the child.”<sup>6</sup> The trial court changed custody of a thirteen-year-old boy from the mother to the father when the mother indicated that she was going to move from Illinois to Iowa to be with her new husband. The court of appeals affirmed, noting that removing the child from Illinois meant

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<sup>5</sup> 70 Ill. App. 572, 1896 WL 3144 (App. Ct. 1896).

<sup>6</sup> *Id.* at \*2.

“his father and brother and sister would have no opportunity of visiting or associating with him. This is against the policy of our law, and ought not to be permitted.”<sup>7</sup>

This case was typical in its clear adherence to the principle that the best interest of the child should guide the trial court. Joel Prentiss Bishop’s treatise, published around 1900, described this principle in its section entitled “removal from the State.” It suggested that while courts sometimes object “to the taking of a child out of the State or country . . . [,] they will approve when such is shown to be for its good.”<sup>8</sup> The “best interest of the child” remained the touchstone of the analysis as time advanced. *Corpus Juris* identified this as the test in 1920.<sup>9</sup> Approximately thirty years later, the Supreme Court of Montana indicated the same: “The rule throughout the country is to permit the removal when it is to the best interest of the children.”<sup>10</sup> The standard in 2003 was identical. The Wyoming Supreme Court said:

[T]here is one common analytical thread in virtually every case [involving international relocation]: the best interest of the child is paramount in any award of custody and visitation, and the trial court has a large measure of discretion in making that award. Whether one parent is moving with the children across town or across the world, the analysis remains the same.<sup>11</sup>

The homage paid to the “best interest of the child” standard suggests a uniformity over time and geography that in fact masks a variety of approaches among states. Others have summarized these approaches well, and these helpful descriptions provide the context

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<sup>7</sup> *Id.* The court of appeals also noted that the original award was made when the child was six and was based upon a belief that a child of tender years should be with the mother. *Id.*

<sup>8</sup> 2 JOEL PRENTISS BISHOP, *NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION AS TO THE LAW, EVIDENCE, PLEADINGS, PRACTICE, FORMS AND THE EVIDENCE OF MARRIAGE IN ALL ISSUES ON A NEW SYSTEM OF LEGAL EXPOSITION* § 1204 (1891).

<sup>9</sup> See 19 C.J. § 805, at 348 (“Removal of Child from Jurisdiction”) (1920).

<sup>10</sup> *State ex rel. Graveley v. Dist. Court*, 174 P.2d 565, 567 (Mont. 1946); see also M.L. Cross, *Order in Divorce or Separation Proceeding Concerning Removal of Child from Jurisdiction, and Award of Custody to Nonresident*, 154 A.L.R. 552, 552-53 (1945) (stating that “[t]he result of the decisions is that where the custodian has a good reason for living in another state and such course is consistent with the welfare of the child, the court will permit such removal or grant custody to the nonresident”).

<sup>11</sup> *Stonham v. Widiastuti*, 79 P.3d 1188, 1194 n.8 (Wyo. 2003).



for this Article's recommendations.<sup>12</sup> Professor Linda Elrod has explained that some jurisdictions apply different rules to the dispute depending upon whether the request for relocation occurs at the point of the initial custody contest or later. "[M]ost courts use the same best interest of the child standard that applies in any custody dispute between fit parents" when the issue of relocation arises at the time of the initial proceeding.<sup>13</sup> Yet when a relocation dispute arises after the initial custody decision, and a court is assessing whether the relocation provides grounds for changing custody, states generally take one of three approaches:

1. Relocation alone is not a change. These states find that a proposed relocation alone is not a change in circumstances, resulting in a presumption in favor of relocation by the custodial or residential parent.
2. Relocation is a sufficient change for a hearing. . . . If a hearing is held, the court may use shifting presumptions so the residential parent has the initial burden to show that the move is in good faith and is in the child's best interest; the burden then shifts to the nonresidential parent to show the move is not in the child's best interests.
3. Relocation may be a change of circumstances, but both parents bear the burden of proving the child's best interests. A move may be a change of circumstances, but the court uses no presumptions. Each party bears the burden of showing why being with him or her is in the child's best interests.<sup>14</sup>

Professor Jeff Atkinson has mapped state law on the presumptions and burden of proof. His taxonomy shows a variety of approaches with no

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<sup>12</sup> See AM. LAW INST., *supra* note 3, § 2.17 cmts. a-d (2002); JEFF ATKINSON, OVERVIEW OF LAW OF RELOCATION IN THE 50 STATES: RELOCATION: THE DEBATE (2006), available at <http://www.abanet.org/family/newsletters/2006/Relocation50States.pdf> (describing laws governing child relocation disputes in each state, including statutory authority and case law); Connie Peterson, *Relocation of Children by the Custodial Parent*, 65 AM. JUR. TRIALS 127, 147-66 (2006) (summarizing each state's approach to child relocation and describing variety of factors states consider); see also Charles C. Abut, *A Child Removal Checklist*, FAM. ADVOC., Spring 2006, at 21, 21 ("Generally cases focus on the best interests of the child, viewed against the background of parents' reasons for advocating or opposing the removal.").

<sup>13</sup> Linda D. Elrod, *States Differ on Relocation: A Panorama of Expanding Case Law*, FAM. ADVOC., Spring 2006, at 8, 8.

<sup>14</sup> *Id.* at 9 (citations omitted).

one approach predominating.<sup>15</sup>

Regardless of the rule structure,<sup>16</sup> adjudications tend to be highly fact-intensive.<sup>17</sup> The Oregon Court of Appeals observed that the outcomes in relocation cases are more highly fact dependent “than in any other type of case.”<sup>18</sup> In addition, courts across jurisdictions consider remarkably similar factors. The commentary to the ALI’s *Principles of the Law of Family Dissolution* describes these “similar factors” as “the benefits to the child of the relocation, the reasons for the move, the good faith of the party seeking to move, and the prejudice to the other parent whose access to the child has been curtailed.”<sup>19</sup> One of the most important factors in the analysis is the effect of the move on the noncustodial parent-child relationship.<sup>20</sup> As Judge Connie Peterson observed: “The finding that meaningful access and visitation cannot be replicated consistent with the decree or the parenting plan is the most common reason courts find that the move is not in the best interest of the child.”<sup>21</sup>

*Morrill v. Morrill*, a decision by the Court of Appeals of North Carolina, illustrates the importance of this consideration.<sup>22</sup> The court affirmed the trial court’s refusal to modify the visitation order, which

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<sup>15</sup> See JEFF ATKINSON, 1 MODERN CHILD CUSTODY PRACTICE §§ 7-1, 7-14 (2d ed. 2006).

<sup>16</sup> Not all relocation disputes manifest themselves as requests for custody modification. Some jurisdictions have rules that allow courts to prohibit the relocation without changing custody. See, e.g., WIS. STAT. ANN. § 767.481(3) (West 2006); *Sill v. Sill*, No. CA 05-703, 2006 WL 337555, at \*7-8 (Ark. Ct. App. Feb 15, 2006); *Mason v. Coleman*, 850 N.E.2d 513, 521 (Mass. 2006); *Cooksey v. Cooksey*, 125 P.3d 57, 61-62, 66 (Or. Ct. App. 2005). These rules generally also require courts to act in the child’s best interest.

<sup>17</sup> Professor Jeff Atkinson wrote, “The trend in the law is toward making decisions about relocation of children based on the facts of each case rather than by application of strong, automatic presumptions for or against relocation.” ATKINSON, *supra* note 12, at 1.

<sup>18</sup> *In re Marriage of Hamilton-Waller*, 123 P.3d 310, 313 (Or. Ct. App. 2005).

<sup>19</sup> AM. LAW INST., *supra* note 3, § 2.17 cmt. d.

<sup>20</sup> This can be true even where a presumption for relocation exists and even where the noncustodial parent bears the burden of establishing the harm to the child from the move. See, e.g., *In re Marriage of LaMusga*, 88 P.3d 81, 84, 94 (Cal. 2004).

<sup>21</sup> See Peterson, *supra* note 12, § 48.

<sup>22</sup> 625 S.E.2d 204 (N.C. Ct. App. 2006) (unpublished table decision).

would have allowed the primary custodian to relocate with the children and her new husband to Texas, where he had obtained a position as a pastor.<sup>23</sup> The father objected to the relocation, claiming that the move “would adversely affect his relationship with the children” and that it constituted “a substantial change in circumstances warranting a change in custody.”<sup>24</sup>

The trial court found the proposed relocation “would likely adversely affect [the children’s] welfare.”<sup>25</sup> It was unlikely that a realistic visitation schedule could be arranged “which [would] preserve and foster their great relationship with their father.”<sup>26</sup> The father attended the children’s sporting events and school open houses, saw the children at least once a week, and provided horseback riding lessons for one of the children.<sup>27</sup> The trial judge also found that it would be “expensive” to fly two children for visitation; the household incomes made “it unlikely that the children could be flown . . . several times a year for visits with their father.”<sup>28</sup>

The appellate court affirmed. It noted that the children were currently excelling and thriving and mentioned the “detrimental effect of the proposed move on the relationship between defendant and his children.”<sup>29</sup> The court stated, “It will be a rare case where the child will not be adversely affected when a relocation of the custodial parent and child requires substantial alteration of a successful custody-visitation arrangement in which both parents have substantial contact with the child.”<sup>30</sup>

The *Morrill* court was right to consider the impact that a move might have on the children’s relationship with the noncustodial parent.<sup>31</sup> This Article only takes issue with *Morrill* and cases like it

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<sup>23</sup> *Id.* at \*1.

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

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at \*2.

<sup>27</sup> *Id.* at \*2-3.

<sup>28</sup> *Id.* at \*2.

<sup>29</sup> *Id.* at \*3.

<sup>30</sup> *Id.*

<sup>31</sup> The weight this factor should receive is another matter. Professor Carol Bruch reviewed the relevant research and concluded that the better research supports allowing custodial parents to relocate. Bruch notes that the literature shows that good outcomes for children turn on continuity in the primary care arrangement and enhancing the ability of the custodial parent to function. She also notes the lack of research showing the importance of a visiting relationship. See Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40

because courts fail to consider whether the noncustodial parent can relocate in order to continue the relationship with the children. The next section focuses on this omission and, before demonstrating how the omission affects the outcome in particular types of cases, illustrates how the omission has infected scholarly analysis about appropriate relocation policy.

### B. A Missing Fact and the Skewed Debate

Both appellate courts and legislatures have formulated lists of factors that judges should consider in adjudicating relocation disputes.<sup>32</sup> Sometimes as many as twenty-five factors are listed,<sup>33</sup> but often jurisdictions mention only four to six.<sup>34</sup> These lists typically omit the noncustodial parent's mobility.<sup>35</sup> Not surprisingly, therefore, the ALI also omits this item from the list of "similar factors" courts consider.<sup>36</sup>

While the listed factors are usually not the only factors courts can consider,<sup>37</sup> the omission of the noncustodial parent's mobility from the lists is significant. The old cliché proves true in this context: something out of sight is typically also out of mind. My review of case law for this Article showed that most cases made no mention of the

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FAM. L.Q. 281, 291-312 (2006). Yet, as even Bruch notes, the findings from the studies are "generalizations." *Id.* at 294. She warns, "Caution must . . . be used in applying the results of any group study to an individual . . . ." *Id.*

<sup>32</sup> See, e.g., ALA. CODE § 30-3-169.3(a) (2006); ARIZ. REV. STAT. § 25-408(I) (LexisNexis 2006); COLO. REV. STAT. § 14-10-129(2)(c) (2006); FLA. STAT. ANN. § 61.13001(7) (West 2006); MICH. COMP. LAWS § 722.31(4) (2006); *Hollandsworth v. Knyzewski*, 109 S.W.3d 653, 663-64 (Ark. 2003); *In re Marriage of LaMusga*, 88 P.3d 81, 91 (Cal. 2004); *Karen J.M. v. James W.*, 792 A.2d 1036, 1041 (Del. Fam. Ct. 2002); *In re Marriage of Eckert*, 518 N.E.2d 1041, 1045-47 (Ill. 1988); *McLaughlin v. McLaughlin*, 647 N.W.2d 577, 587-88 (Neb. 2002); *Tropea v. Tropea*, 665 N.E.2d 145, 150-51 (N.Y. 1996).

<sup>33</sup> See, e.g., FLA. STAT. ANN. §§ 61.13001, 61.13 (West 2006); *In re Marriage of Hamilton-Waller*, 123 P.3d 310, 317-18 & n.11 (Or. Ct. App. 2005).

<sup>34</sup> See, e.g., *Hollandsworth*, 109 S.W.3d at 658-64; *Spire v. Adwell*, 36 S.W.3d 28, 32 (Mo. Ct. App. 2000); *Negaard v. Negaard*, 2002 ND 70, ¶ 9, 642 N.W.2d 916, 920.

<sup>35</sup> See, e.g., ALA. CODE § 30-3-169.3; ARIZ. REV. STAT. ANN. § 25-408(I); COLO. REV. STAT. § 14-10-129; MICH. COMP. LAWS § 722.31(4); *Hollandsworth*, 109 S.W.3d at 658-64; *LaMusga*, 88 P.3d at 91; *Karen J.M.*, 792 A.2d at 1041; *Eckert*, 518 N.E.2d at 1045-46; *McLaughlin*, 647 N.W.2d at 587-88; *Hamilton-Waller*, 123 P.3d at 317-18 & n.11.

<sup>36</sup> See *supra* text accompanying note 19.

<sup>37</sup> See, e.g., ALA. CODE § 30-3-169.3(a)(17), ARIZ. REV. STAT. ANN. § 25-408(H)(1); COLO. REV. STAT. § 14-10-129; FLA. STAT. ANN. § 61.13(3)(m); *Hollandsworth*, 109 S.W.3d at 658; *LaMusga*, 88 P.3d at 91, 97; *Eckert*, 518 N.E.2d at 1045; *Tropea*, 665 N.E.2d at 151.

noncustodial parent's mobility. The work of Professor Theresa Glennon, who reviewed all state judicial opinions on relocation reported on Westlaw that were rendered from June 1, 2001, to June 1, 2006, confirms this conclusion.<sup>38</sup> The dearth of cases that mention the noncustodial parent's mobility suggests that lawyers and jurists do not view this fact as relevant. Authors who advise attorneys on preparing relocation cases perpetuate the unimportance of the noncustodial parent's mobility by not discussing it either.<sup>39</sup>

As Part III.A demonstrates, the inattention to the noncustodial parent's mobility undoubtedly affects the resolution of some relocation disputes. This oversight by scholars has an additional impact: it skews the debate about relocation policy. Bringing the omission to light undermines the arguments of those generally opposed to custodial parents' relocation.

For example, Richard Warshak, a renowned psychologist, very publicly criticized the *amica curiae* brief filed by Judith Wallerstein in *In re Marriage of Burgess*.<sup>40</sup> The *Burgess* decision made it easier for custodial parents in California to relocate. Wallerstein, also a renowned psychologist and perhaps best known for her research on the impact of divorce on children,<sup>41</sup> gave the California Supreme Court

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<sup>38</sup> See Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting* 42 (Jan. 4, 2007) (unpublished manuscript), *available at* <http://www.aals.org/am2007/thursday/glennon.pdf> ("Only in a few instances did a court even consider the possibility that the non-custodial parent could relocate at the same time in order to remain in close proximity to the child. The noncustodial parent's right to remain in the current geographic location was simply assumed."). Glennon examines the economic implications of restrictions on relocation and argues for post-divorce economic adjustments to compensate for the loss that often accompanies a refusal to relocate. *Id.*

<sup>39</sup> See, e.g., ATKINSON, *supra* note 12, at 3 (citing factors considered in deciding whether or not to permit relocation); Roger Adams et al., 24A AM. JUR. 2D *Divorce and Separation* § 993 (2006); Peterson, *supra* note 12, § 50; David N. Hofstein et al., *A Moving Case for Staying Put*, FAM. ADVOC., Spring 2006, at 25, 26-28; Jacqueline M. Valdespino, *Making the "Must Move" Case at Trial*, 28 FAM. ADVOC. 19, 20-24 (2006). But see Elrod, *supra* note 13, at 14 (mentioning as one of 31 factors to consider, "Would it be feasible or practical for the nonrelocating parent to move to or visit regularly in the new location?").

<sup>40</sup> 913 P.2d 473 (Cal. 1996). For a description of the brief's argument, see generally 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, 305 (1996).

<sup>41</sup> See e.g., JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980) (discussing short-term and long-term effects of divorce on children based upon five-year study of 60 divorcing

reason to rule as it did. Among other things, Wallerstein argued that forcing a custodial parent to choose her child's companionship over her own life opportunities may cause depression, with consequent harm to the child from diminished parenting.<sup>42</sup> Warshak took issue with Wallerstein's argument in an article published in the *Family Law Quarterly*. He stated:

[W]e should balance this with consideration of the impact on the father or mother whose children are taken away. . . . In addition to reducing direct contact, relocation deprives the noncustodial parent of the opportunity to participate in parent-teacher conferences, help with home-work and other projects, listen to the children's worries, and regularly attend children's extracurricular activities.<sup>43</sup>

Warshak's argument becomes suspect once the mobility of the noncustodial parent is considered. It is arguably inappropriate to compare the effect on the custodial parent with the effect on the noncustodial parent if the noncustodial parent can follow his children to the new location. The custodial parent's harm, as described by Wallerstein, flows from another's decision that she cannot relocate, but the noncustodial parent's harm, as described by Warshak, flows from that parent's own decision that he will not relocate. Consequently, comparing the two situations seems misguided.

Warshak also suggests that relocation causes children to experience guilt from "leaving behind a parent, thereby causing that parent great anguish."<sup>44</sup> Children, however, do not leave anyone behind. In fact, any anguish the noncustodial parent experiences is caused by that person's own failure to follow the child. In addition, contrary to Warshak's assertion, any "guilt" the child experiences is probably attributable to the noncustodial parent's inertia. The noncustodial

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families); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN & CHILDREN A DECADE AFTER DIVORCE* (1989) (analyzing experiences of many participants discussed in *SURVIVING THE BREAKUP*, *supra*, 10 years after divorce); JUDITH WALLERSTEIN, JULIA LEWIS & SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* (2000) (analyzing experiences of many participants discussed in *SURVIVING THE BREAKUP*, *supra*, 25 years after divorce); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *WHAT ABOUT THE KIDS?: RAISING YOUR CHILDREN BEFORE, DURING, AND AFTER DIVORCE* (2003).

<sup>42</sup> Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM L.Q. 83, 98 (2000).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

parent's failure to follow the child may raise questions in the child's mind about whether the child has done enough to make the noncustodial parent want to follow. As Wallerstein and Tanke note, "A child who feels abandoned or rejected by a father suffers tragically, often turning the feelings back on himself or herself as unworthy of being loved."<sup>45</sup>

When the noncustodial parent's decision to stay put is ignored, the equities of the situation may appear to justify high hurdles to relocation. For example, Professor Merrill Sobie defended the idea that the custodial parent should demonstrate "exceptional circumstances" to justify a move.<sup>46</sup> Sobie favored the "exceptional circumstance" requirement because he believed the custodial parent was solely responsible for any harm the relocation caused to the noncustodial parent-child relationship:

In a custody or visitation dispute where both parents reside in the same community, or at least within commuting range, the rights and interests of all the participants can be protected by balancing custody with visitation. It may not be a facile exercise, and the disappointments in dissolving an integral family unit may be severe, but the court possesses the ability to order the continuation of a meaningful relationship between the child and each of the then-embattled parents. *However, that ability breaks down when the custodial parent decides, for whatever reason, to relocate to a distant locale. Relocation is the only voluntary event which jeopardizes the continuation of a meaningful relationship with each parent.* One of the bonds must be broken, or at least severely diminished.

The precipitating fact is the custodial parent's decision to move. Courts are powerless to prevent a parental move. By exercising his or her right to relocate, the custodial parent thereby unilaterally frustrates the noncustodial parent's visitation or, to phrase it more appropriately, the continuation of a meaningful relationship. Something has to give, and the court is faced with the perhaps Hobson's choice of changing custody or sanctioning an abridgement of the child-parent relationship unless, of course, the custodial parent seeks prior permission to relocate, is unsuccessful, and then elects to

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<sup>45</sup> Wallerstein & Tanke, *supra* note 40, at 312.

<sup>46</sup> Merrill Sobie, *Whatever Happened to the "Best Interests" Analysis in New York Relocation Cases?*, 15 PACE L. REV. 685, 688-89 (1995).

remain.<sup>47</sup>

Sobie failed to recognize that it is *both* the decision of the custodial parent to relocate *and* the decision of the noncustodial parent to stay that *together* produce the strain. Once that is acknowledged, Sobie's articulated justification for a high hurdle to permissible relocation disappears.

A final example — and arguably the most important one — involves the research conducted by Professors Sanford Braver, Ira Ellman, and William Fabricius. The authors claim their study is the “first direct evidence” on the effects of relocation.<sup>48</sup> The study surveyed 2,067 college students, 602 of whom had divorced parents, about the relocations of their custodial and noncustodial parents. It also gathered data on a wide variety of factors, including current substance abuse, financial support received during college, and romantic relationship choices.

The authors found that “a variety of poor outcomes are associated with postdivorce parental moves,” although the authors admitted their research only established correlations.<sup>49</sup> Nonetheless, they said that the data “appear to exclude . . . that the parental move improves the children's situation. Had this possibility been valid, the moving groups would have had superior outcomes rather than the inferior ones found.”<sup>50</sup> The authors concluded that their study “suggests that courts would be mistaken to assume, in the absence of contrary evidence, that children benefit from moving with their custodial parent to a new location that is distant from their other parent whenever the custodial parent wishes to make the move.”<sup>51</sup> Touting the utility of their data for lawmakers, the researchers offer some specific advice: “[T]here may be real value in discouraging moves by

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<sup>47</sup> *Id.* (citations omitted) (emphasis added); *id.* at 689 (“[I]t is [the custodial parent] who, even if for the best of reasons, must ultimately be considered responsible for the breakdown of what had been a fair and equitable custody arrangement.”) (citation omitted). Even those who advocate seeing the post-divorce families as “binuclear” sometimes fail to notice the importance of the noncustodial parent's mobility to the child's best interest. See, e.g., Robert E. Oliphant, *Relocation Custody Disputes — A Binuclear Family-Centered Three-Stage Solution*, 25 N. ILL. U. L. REV. 363, 394-95 (2005).

<sup>48</sup> Sanford L. Braver, Ira M. Ellman & William V. Fabricius, *Relocation of Children After Divorce and Children's Best Interest: New Evidence of Legal Considerations*, 17 J. FAM. PSYCHOL. 206, 206 (2003).

<sup>49</sup> *Id.* at 214.

<sup>50</sup> *Id.* at 215.

<sup>51</sup> *Id.*



custodial parents, at least in cases in which the child enjoys a good relationship with the other parent and the move is not prompted by the need to otherwise remove the child from the detrimental environment.”<sup>52</sup>

The authors’ conclusions are suspect because they failed to evaluate what happens when a parent moves and the other parent follows.<sup>53</sup> It is unclear why this variation was not investigated. Perhaps the authors assumed that the other parent rarely can or will follow. This possibility finds support in a hypothetical included by the authors. It presented a father who could not also relocate “without an immediate and substantial sacrifice in income and without imposing severe dislocations on his new wife, who also has a career requiring her to remain where she is.”<sup>54</sup> The researchers also discussed a real case in which the father “could not move to the same location as the custodial parent and child without considerable sacrifice.”<sup>55</sup>

Perhaps no parent in the Braver sample ever followed the other parent, and perhaps the authors’ hypothetical is representative of real life. However, since the data was not gathered, it is impossible to know for sure. This failure to gather evidence about parallel relocations casts a shadow on the authors’ conclusions and policy recommendations, especially because the authors recognize the importance of the noncustodial parent’s mobility to the analysis as evidenced by its mention in the hypothetical and real case. It simply may *not* be best to discourage moves by custodial parents when the child has a good relationship with the other parent if the noncustodial parent can follow. On the contrary, policymakers might be best advised to *allow* custodial parents to move *and* to encourage noncustodial parents to follow.

### C. The Non-Conforming Few

It is surprising that so few jurisdictions require courts to consider the noncustodial parent’s mobility and that no reformers have urged

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<sup>52</sup> *Id.* at 216.

<sup>53</sup> *Id.* at 211. While the survey appears to have inquired about whether both parents moved, it did not ask whether they moved to the same location.

<sup>54</sup> *Id.* at 208.

<sup>55</sup> *Id.* at 216 (citing *In re Marriage of Bryant*, 110 Cal. Rptr. 2d 791 (Ct. App. 2001)). The appellate decision is silent about whether Mr. Bryant could relocate or not, and mentions no facts at all to show relocation would be a “considerable sacrifice.”

the adoption of such a requirement.<sup>56</sup> The idea is not without its supporters, however. A few jurisdictions list the noncustodial parent's mobility as a relevant factor to consider, including some jurisdictions with very prestigious courts. The jurisdictions that give attention to the noncustodial parent's mobility are New York, Texas, Louisiana, Washington, Florida, and New Jersey.<sup>57</sup>

*Tropea v. Tropea* is a well-known case that explicitly made the noncustodial parent's mobility relevant to the relocation analysis.<sup>58</sup> The New York Court of Appeals addressed the "scope and nature of the inquiry that should be made in cases where a custodial parent proposes to relocate."<sup>59</sup> The court rejected an analysis that required exceptional circumstances for a relocation,<sup>60</sup> and instead adopted a more permissive test: "[E]ach relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child."<sup>61</sup> The court mentioned numerous factors that a trial court should consider and specifically included the noncustodial parent's ability to relocate:

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<sup>56</sup> See *infra* Part II.

<sup>57</sup> See *Baures v. Lewis*, 770 A.2d 214, 230 (N.J. 2001); *Tropea v. Tropea*, 665 N.E.2d 145, 151 (N.Y. 1996); *Hallett v. Morse*, 664 N.Y.S.2d 155, 156 (N.Y. App. Div. 1997) (remanding for reconsideration in light of *Tropea*); *Harder v. Yandoh*, 644 N.Y.S.2d 83, 85 (N.Y. App. Div. 1996); *Lenz v. Lenz*, 79 S.W.3d 10, 18 (Tex. 2002); *Womack v. Womack*, No. 10-05-00182, 2006 WL 1911004 (Tex. App. July 12, 2006) (citing *Lenz*); *In re Interest of C.R.O.*, 96 S.W.3d 442, 449 (Tex. App. 2002); see also *infra* note 75 (citing statutory provisions from Louisiana, Washington, and Florida). Occasionally one sees a court in another jurisdiction mention the fact, too. See *Pierce v. Pierce*, 884 So. 2d 855, 857 (Ala. Civ. App. 2003) (finding "[f]ather is an established partner in a local law firm with no such opportunity to move his practice"); *Farnsworth v. Farnsworth*, 597 N.W.2 592, 599-601 (Neb. 1999) (mentioning relevance of noncustodial parent's mobility in dicta).

<sup>58</sup> *Tropea*, 665 N.E. 2d at 151.

<sup>59</sup> *Id.* at 146.

<sup>60</sup> This test was described more fully by the court as follows: "The most commonly used formula involves a three-step analysis that looks first to whether the proposed relocation would deprive the noncustodial parent of 'regular and meaningful access to the child.' Where a disruption of 'regular and meaningful access' is not shown, the inquiry is truncated, and the courts generally will not go on to assess the merits and strength of the custodial parents' motive for moving. On the other hand, where such a disruption is established, a presumption that the move is not in the child's best interest is invoked and the custodial parent seeking to relocate must demonstrate 'exceptional circumstances' to justify the move. Once that hurdle is overcome, the court will go on to consider the child's best interests." *Id.* at 149.

<sup>61</sup> *Id.* at 150.

“[W]here the custodial parent’s reasons for moving are deemed valid and sound, the court in a proper case might consider the possibility and feasibility of a parallel move by an involved and committed noncustodial parent as an alternative to restricting a custodial parent’s mobility.”<sup>62</sup>

Although *Tropea* received much attention,<sup>63</sup> this part of the decision has been virtually forgotten. Because this factor was not included on the concise list of factors that courts were told to consider when adjudicating relocation requests,<sup>64</sup> courts in New York and around the country have forgotten about it, even though the listed factors were not meant to be exclusive. Since the importance of this factor was not evident from the facts in the opinion,<sup>65</sup> courts and commentators repeatedly recite the *Tropea* list without including mention of the noncustodial parent’s mobility.<sup>66</sup>

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<sup>62</sup> *Id.* at 151.

<sup>63</sup> See Judge Thomas A. James, Jr., *Custody Relocation Law in Pennsylvania: Time to Revisit and Revise* Gruber v. Gruber, 107 DICK. L. REV. 45, 61 (2002).

<sup>64</sup> *Tropea*, 665 N.E.2d at 151 (“These factors include, but are certainly not limited to each parent’s reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child’s future contact with the noncustodial parent, the degree to which the custodial parent’s and child’s life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements.”).

<sup>65</sup> Neither of the cases that comprised *Tropea* examined the noncustodial parent’s mobility. In one case, the lower court had permitted the relocation because “the visitation schedule that petitioner proposed would afford respondent frequent and extended visitation,” and that decision was affirmed. In the other case, the 130-mile move did not “deprive respondent of a meaningful opportunity to maintain a close relationship with his son,” and the move was in the child’s best interest. *Id.* at 152.

<sup>66</sup> See, e.g., *Ireland v. Ireland*, 717 A.2d 676, 685-87 (Conn. 1998) (holding trial court improperly placed burden of proof on custodial parent to prove relocation would be in best interest of child, and giving guidance on relevant criteria for best interest inquiry); *Willis-Marsh v. Wilkerson*, 803 N.Y.S.2d 231, 233 (N.Y. App. Div. 2005) (affirming trial court’s denial of petitioner’s request to relocate); *Leach v. Santiago*, 798 N.Y.S.2d 242, 243-44 (N.Y. App. Div. 2005) (affirming trial court’s denial of petitioner’s request to relocate); *Milea v. Paradiso*, 719 N.Y.S.2d 749, 751-52 (N.Y. App. Div. 2001) (affirming family court’s order denying petitioner sole custody of children and permission to relocate); see also *Ford v. Ford*, 789 A.2d 1104, 1108 (Conn. Ct. App. 2002); *Dupre v. Dupre*, 857 A.2d 242, 250 (R.I. 2004); *Rice v. Rice*, 517 S.E.2d 220, 224 (S.C. Ct. App. 1999); Kathryn E. Abare, Note, *Protecting the New Family: Ireland v. Ireland and Connecticut’s Custodial Parent Relocation Law*, 32 CONN. L. REV. 307, 316 (1999); Kelly Gibbons, Comment, *The Ties That Bind: Why Texas Should Adopt a Presumption That Relocation Is Not in the Best Interests of the Child*, 12 TEX. WESLEYAN L. REV. 555, 561 (2006). But see *Farnsworth v. Farnsworth*, 597

Nor has a decision by the Supreme Court of Texas, *Lenz v. Lenz*,<sup>67</sup> which also discussed the noncustodial parent's mobility, had the sort of impact one might expect. In *Lenz*, the court affirmed a jury verdict that modified a divorce decree to allow a custodial mother to move to Germany with her children. The court held that the noncustodial parent's ability to relocate was relevant to the legal analysis.<sup>68</sup> It commented:

[The Father] could easily relocate to Germany in order to be with his sons. Besides being a native German, [the father] has many employment options in Germany. . . . Furthermore, [the father] has an advanced German business degree. [The father's] ability to move to Germany is some evidence that [the mother's] relocating the boys to Germany would not necessarily result in diminished contact between [the father] and the boys.<sup>69</sup>

The procedural posture of *Lenz* has limited its impact. Authors of the annual survey of Texas law explained:

[The] actual ruling of the supreme court [in *Lenz*] is limited to simply stating that since there was more than a scintilla of evidence to support the jury's finding that the mother should have the exclusive right to determine the children's primary residence, the trial court had no authority to contravene that

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N.W.2d 592, 598-601 (Neb. 1999) (finding district court did not abuse its discretion when it permitted relocation, and setting forth factors courts are to consider in adjudicating relocation requests); *Thompson v. Smith*, 715 N.Y.S.2d 505, 507-08 (N.Y. App. Div. 2000) (affirming trial court's order permitting relocation and noting feasibility of parallel move by father, single self-employed machinist and part-time baker); *Hallett v. Morse*, 664 N.Y.S.2d 155, 156 (N.Y. App. Div. 1997) (remanding for reconsideration in light of *Tropea*); *Harder v. Yandoh*, 644 N.Y.S.2d 83, 85-86 (N.Y. App. Div. 1996) (affirming trial court's order that relocation was in children's best interest and noting that "since respondent is renting an apartment, is unemployed and lives on public assistance, she may well contemplate a move within a half-hour distance to the children's new residence to ensure the resumption of her midweek visitation"); *Lenz v. Lenz*, 79 S.W.3d 10, 18-19 (Tex. 2002) (holding trial court could not impose geographic restriction on child's primary residence contrary to jury verdict that was based on legally sufficient evidence); *but cf. In re Interest of C.R.O.*, 96 S.W.3d 442, 449 (Tex. App. 2002) (upholding imposition of domicile restriction and citing *Baures v. Lewis* solely for relevance of noncustodial parent's mobility, although court also cites *Tropea* factors).

<sup>67</sup> *Lenz*, 79 S.W.3d at 10.

<sup>68</sup> *Id.* at 15.

<sup>69</sup> *Id.* at 18.

verdict by restricting the children's residence to Bexar County, Texas.<sup>70</sup>

The authors also note that *Lenz* was overshadowed by a decision of the El Paso Court of Appeals in *Bates v. Tesar*,<sup>71</sup> issued on the same day. The *Bates* opinion is twenty-six pages long and provides family law practitioners in Texas much more guidance on relocation issues.<sup>72</sup> *Bates*, however, makes no mention of the noncustodial parent's mobility as an important consideration, even though it listed factors relevant to determining whether relocation is a material and substantial change of circumstances.<sup>73</sup> *Lenz*'s precise holding and its timing probably have contributed to its lack of impact. Cases citing *Lenz* typically omit the noncustodial parent's mobility as a factor to consider, or mention it only in passing.<sup>74</sup>

Statutes in Louisiana, Washington, and Florida make the noncustodial parent's mobility an explicit part of the analysis,<sup>75</sup> but

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<sup>70</sup> Melina H. Eitzen et al., *Family Law: Parent and Child*, 56 SMU L. REV. 1707, 1710 (2003).

<sup>71</sup> 81 S.W.3d 411 (Tex. Ct. App. 2002).

<sup>72</sup> Eitzen, *supra* note 70, at 1710.

<sup>73</sup> *Bates*, 81 S.W.3d. at 429-30.

<sup>74</sup> This conclusion was reached by reading the four cases in Texas and one case in Colorado that contained a keynote cite to headnote five of *Lenz*, the headnote that referenced the importance of the noncustodial parent's mobility. See *In re Marriage of Ciesluk*, 113 P.3d 135, 143 (Colo. 2005) (citing *Lenz*, but not *Lenz* factors and not mentioning noncustodial parent's mobility); *Fox v. Fox*, No. 03-04-00749, 2006 WL 66473, at \*4 (Tex. App. Jan 13, 2006) (citing factors discussed in *Lenz*, but omitting factor relating to consideration of noncustodial parent's mobility); *Cisneros v. Dingbaum*, No. 08-03-00477, 2005 WL 697577, at \*13 (Tex. App. Mar. 17, 2005) (citing factors discussed in *Lenz*, but omitting factor relating to consideration of noncustodial parent's mobility); *Hoffman v. Hoffman*, No. 03-03-00062, 2003 WL 22669032, at \*7 (Tex. App. Nov. 13, 2003) (citing *Lenz* generally, but not citing or considering noncustodial parent's mobility); *Knopp v. Knopp*, No. 14-02-00285, 2003 WL 21025527, at \*5 (Tex. App. May 8, 2003) (citing this *Lenz* factor but then citing no evidence relevant to noncustodial parent's mobility); see also *Womack v. Womack*, No. 10-05-00182, 2006 WL 1911004, at \*2 (Tex. App. July 12, 2006) (citing *Lenz* in passing). But see *In re Interest of C.R.O.*, 96 S.W.3d 442, 449 (Tex. App. 2002) (citing *Baures*).

<sup>75</sup> See FLA. STAT. ANN. § 61.13001(7)(i) (2006) ("In reaching its decision regarding a proposed temporary or permanent relocation, the court shall evaluate . . . [t]he career or other opportunities available to the objecting parent or objecting other person if the relocation occurs."); LA. REV. STAT. ANN. § 9:355.12(A)(10) (2006) ("[I]n reaching its decision regarding a proposed relocation, the court shall consider the following factors . . . (10) The feasibility of a relocation by the objecting parent."); WASH. REV. CODE § 26.09.520(9) (2006) ("A person entitled to object to the intended relocation . . . may rebut the presumption [that relocation will be permitted] by

this factor has not received any real emphasis from these states' appellate benches.<sup>76</sup> Nor have other states' courts cited Louisiana, Washington, or Florida law for the proposition that this factor is important.<sup>77</sup>

In Louisiana, for example, an appellate court suggested that this factor might have made a difference if it were the fact finder, but it refused to set aside the trial court's denial of the relocation because the trial court's conclusion that the father could not relocate was not clearly erroneous.<sup>78</sup> Another Louisiana appellate opinion did not criticize the trial court for its slender findings regarding the noncustodial parent's mobility:

[The objecting parent] does not feel like it is feasible to relocate. . . . He has no one up there. . . . [F]easibility is not really a big factor. Although he did testify that if things did not go well for him in my decision, that he would seriously consider making arrangements to be closer to his daughter.<sup>79</sup>

A Washington statute lists eleven factors that a court must consider when adjudicating a dispute about parental relocation, including the noncustodial parent's mobility.<sup>80</sup> An en banc Washington Supreme

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demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating parent, based upon the following factors . . . (9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also.”).

<sup>76</sup> See *infra* text accompanying notes 78-84.

<sup>77</sup> Courts in sister states that cite the Louisiana statute fail to mention the noncustodial parent's mobility specifically or fail to consider the noncustodial parent's mobility in their own analysis. See *In re Marriage of Hamilton-Waller*, 123 P.3d 310, 318 (Or. Ct. App. 2005).

<sup>78</sup> See *Leaf v. Leaf*, 929 So. 2d 131, 136 (La. Ct. App. 2006). In this case, the trial court found that the father could not relocate because he had recently started a business as a carpenter and contractor and his business relied heavily on personal contacts, which were just starting to develop. *Id.* In addition, the father had a new family in New Orleans. *Id.* See also *Payne v. Payne*, 930 So. 2d 1181, 1184-85 (La. Ct. App. 2006) (recognizing factor, but emphasizing mother's financial and emotional gains and child's young age as reasons to allow relocation).

<sup>79</sup> *Peacock v. Peacock*, 903 So. 2d 506, 513 (La. Ct. App. 2005) (calling trial court's findings “careful and meticulous”). Relocation was allowed in *Peacock*, and the objecting parent did not appeal this finding about his mobility since it was obviously in his favor. *Id.*

<sup>80</sup> Courts in Washington State considered this factor prior to the 2000 adoption of a statute incorporating this factor. See, e.g., *In re Marriage of Littlefield*, 940 P.2d 1362, 1365 (Wash. 1997) (en banc) (reversing trial court's order that mother move to Washington State with child, although noting psychologist's testimony that it would

Court called the eleven statutory factors “equally important.”<sup>81</sup> However, the noncustodial parent’s mobility has never been determinative or even particularly important to the outcome of any reported case,<sup>82</sup> although trial courts do consider it in evaluating the custodial parent’s presumptive right to relocate.<sup>83</sup> For example, the appellate court in one case thought the father could relocate with the mother and children, but affirmed the trial court’s refusal to let the mother relocate because the father’s mobility was “a subject on which good minds could differ,”<sup>84</sup> and most of the other eleven factors were not in the mother’s favor.

The statute in Florida came into force only in October 2006, and no case reported on Westlaw referred to it at the time this Article went to press. Consequently, it is too early to assess its importance in Florida.

New Jersey is the state that best and most consistently recognizes the importance of the noncustodial parent’s mobility.<sup>85</sup> In 1989, *Murnane v. Murnane* identified the noncustodial parent’s mobility as an

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be “more difficult for Edmund to move to California than for Charissa to move to Seattle because of his business and because Charissa ‘has only a year’s worth down there at this point’”).

<sup>81</sup> *In re Marriage of Horner*, 93 P.3d 124, 130 (Wash. 2004) (en banc).

<sup>82</sup> In *Wilkinson v. Tullock*, for example, the trial court did not even enter findings on this factor, although findings on other factors were entered. No. 23535-1-III, 2006 WL 2641169, at \*4 (Wash. Ct. App. Sept. 14, 2006).

<sup>83</sup> See *id.* at \*2; *Venable v. Venable*, No. 52084-9-I, 2003 WL 22173061, at \*4 (Wash. App. Ct. Sept. 22, 2003).

<sup>84</sup> *In re Marriage of Grigsby*, No. 48226-2-I, 2002 WL 205485, at \*7 (Wash. App. Ct. Feb. 11, 2002).

<sup>85</sup> See, e.g., *Baures v. Lewis*, 770 A.2d 214, 230 (N.J. 2001) (remanding after clarifying that custodial parent who seeks to relocate bears burden of showing good faith motive and that move will not be inimical to child’s interests, and holding that impact of relocation on visitation is factor relevant to child’s interest, not independent prong to consider, and that noncustodial parent’s ability to relocate is relevant if visitation arrangement after relocation would be problematic for child); *Rampolla v. Rampolla*, 635 A.2d 539, 543 (N.J. Super. Ct. App. Div. 1993) (reversing and remanding so that trial court could consider in its adjudication of mother’s request to relocate with children “whether father could relocate as a method of ensuring the vitality of the shared custody arrangement”); *Murnane v. Murnane*, 552 A.2d 194, 200 (N.J. Super. Ct. App. Div. 1989) (directing trial court to consider on remand, inter alia, burden noncustodial parent would suffer if he had to relocate to remain close to his child versus burden mother will suffer if she cannot relocate and maintain custody).

important factor to consider,<sup>86</sup> although *Rampolla v. Rampolla*,<sup>87</sup> a 1993 case decided by the New Jersey Superior Court gets more credit for the rule.<sup>88</sup> The Supreme Court of New Jersey discussed the relevance of the factor in its 2001 opinion in *Baures v. Lewis*.<sup>89</sup> Yet dicta in the New Jersey cases have limited the potential impact of these decisions.

The relocation dispute in *Rampolla* arose after the parties had divorced and shared legal and residential custody of the couple's two children. Although the mother had the majority of residential time,<sup>90</sup> both parents actively participated in the rearing of the children. The father coached his children's sports teams, assisted with homework, and attended school functions.<sup>91</sup> The father lived in the former marital home and the children had strong ties to the neighborhood.<sup>92</sup> The parties lived close to each other and cooperated with each other.<sup>93</sup> The parties' settlement agreement, which was incorporated into the divorce decree, contained a provision addressing the geographic distance the parties should live from each other: "It is the intention of both parents that they intend to live in as close proximity to each other in order to maximize the amount of contact that each of the children shall be able to have with their parents."<sup>94</sup> The agreement also imposed an obligation to consult with the other parent about relocation, but stated that if the parties were unable to reach an agreement, "either party may file an application with the Court."<sup>95</sup>

The mother sought to move the children from Mercer County, New Jersey, to Staten Island, New York, after she remarried a Staten Island

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<sup>86</sup> *Murnane*, 552 A.2d at 200. The factor had been mentioned earlier in *Helentjaris v. Sudano*, 476 A.2d 828, 832 (N.J. Super. Ct. App. Div. 1984).

<sup>87</sup> *Rampolla*, 635 A.2d 539.

<sup>88</sup> *Murnane* was cited by *Harris v. Harris*, 563 A.2d 64, 71 (N.J. Super. Ct. Ch. Div. 1989) and *Rampolla*, 635 A.2d at 543. *Rampolla* was cited in the following cases for the proposition that the court needs to consider the mobility of the noncustodial parent: *Baures*, 770 A.2d at 221; *Voit v. Voit*, 721 A.2d 317, 328 (N.J. Super. Ct. Ch. Div. 1998); *Levine v. Bacon*, 687 A.2d 1057, 1065 (N.J. Super. Ct. App. Div. 1997); *Lenz v. Lenz*, 79 S.W.3d 10, 18 (Tex. 2002).

<sup>89</sup> *Baures*, 770 A.2d at 233.

<sup>90</sup> Although the parties' initial agreement allocated the majority of residential time to the mother, the agreement was later modified to permit the father to spend two weekday overnights with the children during the school year, and all Tuesdays and Thursdays with the children during the summer. *Rampolla*, 635 A.2d at 539-40.

<sup>91</sup> *Id.* at 541.

<sup>92</sup> *Id.* at 540.

<sup>93</sup> *Id.* at 540-41.

<sup>94</sup> *Id.* at 540.

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



resident. The father responded by seeking primary residential custody of the children. The trial court heard from the mother's and father's experts<sup>96</sup> as well as from the children, both of whom opposed the relocation.<sup>97</sup> The trial judge denied the relocation. It noted the move would affect the father's regular and frequent visitation and found that the children's separation from their father would "severely strain[]" them.<sup>98</sup> It also denied the father's request for primary residential custody.<sup>99</sup>

The mother appealed, and the appellate court reversed. The court criticized the trial judge for failing to address "an issue which is crucial to the disposition of this case: whether defendant could relocate as a method of ensuring the vitality of the shared custody arrangement."<sup>100</sup> The court explained that this inquiry would help achieve gender parity<sup>101</sup> and would also "offer an alternative to the all or nothing outcome" that might otherwise result.<sup>102</sup> It said, "[R]eplicating the status quo in another location becomes a valuable alternative with concomitant benefit to all parties."<sup>103</sup> The court emphasized that this inquiry must be made in every relocation case.<sup>104</sup> The court reversed and remanded for further fact-finding as necessary, noting that neither parent had deep roots nor family in New Jersey,<sup>105</sup> and comparing the commutes the father and the mother's new husband would have from each location.<sup>106</sup>

Dicta in *Rampolla* minimized the importance of the *Rampolla* holding. The court suggested that most noncustodial parents will not be in a position to relocate: "Realistically, in most cases, both parties will not have equal ability to relocate."<sup>107</sup> The court restricted the importance of the noncustodial parent's mobility to "cases in which the party resisting the move has the flexibility to live elsewhere." The court gave the following example of someone with such flexibility:

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<sup>96</sup> *Id.* at 541-42.

<sup>97</sup> *Id.* at 542.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 543.

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

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

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 543-44.

<sup>105</sup> *Id.* at 544.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 543.

“[A] person who runs a home business or one who travels long distances or is licensed to practice a profession in more than one state might well be able to move his or her base of operations.”<sup>108</sup>

The court also mentioned that an agreement by the parties might make an inquiry into the noncustodial parent’s mobility inappropriate. The court specifically stated that “nothing in the property settlement agreement suggests that the parties intended to be chained to Mercer County forever,” but rather the parties contemplated a possible relocation, bargaining only for proximity and shared custody.<sup>109</sup>

In 2001, the Supreme Court of New Jersey cited *Rampolla in Baures v. Lewis*,<sup>110</sup> reaffirming that the noncustodial parent’s mobility was relevant to the relocation analysis. Baures and Lewis married, had a child, and moved to New Jersey to accommodate Lewis’s (the father’s) career in the Navy. In 1996, two years after they arrived in New Jersey, the couple decided to divorce. Baures (the mother) requested custody and permission to relocate to Wisconsin. She was a native of Wisconsin, and her parents — both retired school teachers — lived there and could help care for the child, who had a form of autism.<sup>111</sup>

New Jersey had also become too expensive for the mother. In Wisconsin, she could work while her parents provided childcare.<sup>112</sup>

The trial court denied the removal, as it was not in the child’s “best interest” to move.<sup>113</sup> The move would adversely affect the visitation arrangement between the father and child. Although the mother had offered the father one week a month of visitation, the father had testified that he could not visit regularly because of his Navy service.<sup>114</sup> The trial court also found that the father could not relocate to Wisconsin with the mother and child because of his Navy commitment.<sup>115</sup> However, when the Navy discharged the father in 1998, the mother again petitioned to relocate and asked the trial court to conduct a hearing on whether Lewis could relocate to Wisconsin also. After hearing evidence from the father and the mother’s expert

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 544.

<sup>110</sup> 770 A.2d 214, 217 (N.J. 2001).

<sup>111</sup> *Id.* at 217-19.

<sup>112</sup> *Id.* at 218.

<sup>113</sup> *Id.* at 220.

<sup>114</sup> *Id.* at 219-20.

<sup>115</sup> *Id.* at 220.

on the availability of jobs in Wisconsin for the father, the trial court again denied the mother's request to relocate, stating that there was "insufficient evidence" to show that the father could obtain a job near the mother and child.

The New Jersey Supreme Court granted certification.<sup>116</sup> It outlined the proper approach in New Jersey for adjudicating relocation cases, and emphasized that the party seeking to relocate must show that the move is in good faith and will not be detrimental to the child. The plaintiff should come forward with a visitation proposal that maintains the parent-child relationship sufficiently so that there is no detriment to the child. The noncustodial parent must then produce evidence indicating that the move is not in good faith or would be inimical to the child's interests, perhaps because the change in visitation would harm the child. As part of this approach, the court outlined twelve factors that trial courts should consider, including "whether the noncustodial parent has the ability to relocate."<sup>117</sup>

The court remanded the case. It noted that the mother had clearly established a good faith reason for moving, but she needed to establish that the child would not suffer from the move. She had failed to introduce sufficient evidence regarding special education opportunities in Wisconsin.<sup>118</sup> Assuming the mother could meet her burden on remand, the father would then have to show a particularized harm that would occur from removal. As part of his burden, the father would have to "produce evidence regarding his capacity to move."<sup>119</sup> In particular, he would have to make a legitimate effort to seek employment in the community, or show some reason, such as his ties to New Jersey, as to why he could not relocate.<sup>120</sup> Citing *Rampolla*, the court again emphasized that "relocation by the noncustodial parent is likely to occur only in unusual cases."<sup>121</sup>

*Rampolla* and *Baures* are excellent examples of the relevance of the noncustodial parent's mobility to the relocation inquiry. Neither case, however, has received much attention outside New Jersey. While several courts have cited *Baures* or *Rampolla*,<sup>122</sup> only Texas (in *Lenz*,

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<sup>116</sup> *Id.* at 232.

<sup>117</sup> *Id.* at 230.

<sup>118</sup> *Id.* at 232.

<sup>119</sup> *Id.* at 233.

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

<sup>121</sup> *Id.*

<sup>122</sup> Several courts have cited *Baures*. See *Hollandsworth v. Knyzewski*, 79 S.W.3d

discussed earlier) picked up the importance of the noncustodial parent's mobility.<sup>123</sup>

One wonders if the dicta in these New Jersey cases have convinced others that the noncustodial parent's mobility is typically irrelevant to the analysis, and the analysis need not, therefore, occur. The limiting language in *Rampolla* and *Baures* should not stop an inquiry into the noncustodial parent's mobility because the feasibility of such a move or the meaning of any agreement can only be assessed after fact-finding. Nor should the dicta lead courts to prejudge the merits of the noncustodial parent's claim that relocation is not feasible. Although both *Rampolla* and *Baures* suggest that the noncustodial parent's relocation will only be an option in "unusual" cases, this comment implicitly reflects concerns about feasibility, and neither court analyzed the weight that should be attributed to feasibility or the limits of a feasibility argument. While feasibility is discussed more extensively in Part IV.B, the topic is briefly addressed here to eliminate doubt about whether many cases would benefit from an inquiry into the noncustodial parent's mobility.

Questions of feasibility address how much inconvenience and cost a court can fairly impose on the noncustodial parent. A determination about fairness, however, requires a court to compare the noncustodial parent's concerns about inconvenience and cost with the custodial parent's concerns about inconvenience and cost from not being permitted to relocate. The court in *Murnane*, the first New Jersey case mentioned in this section, in fact balanced the relative equities without making sweeping generalizations about feasibility:

[I]n view of the *Holder* court's emphasis on the parity of men and women, in seeking to determine whether the move can be

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856, 866 (Ark. Ct. App. 2002) (Bird, J., concurring); *In re Ciesluk*, 113 P.3d 135, 142 (Colo. 2005); *Spahmer v. Gullette*, 113 P.3d 158, 163 (Colo. 2005); *Ford v. Ford*, 789 A.2d 1104, 1110 (Conn. App. Ct. 2002); *Mason v. Coleman*, 850 N.E.2d 513, 518-19 (Mass. 2006); *In re Marriage of Hamilton-Waller*, 123 P.3d 310, 312 n.3 (Or. Ct. App. 2005); *Dupre v. Dupre*, 857 A.2d 242, 251 (R.I. 2004). *Rampolla* has also been cited by several courts. See *supra* note 88.

<sup>123</sup> *Lenz v. Lenz*, 79 S.W.3d 10, 18 (Tex. 2002) (citing *Rampolla*); see also *In re Interest of A.C.S.*, 157 S.W.3d 9, 24 (Tex. App. 2004) (citing *Lenz* factors, and holding that trial court abused its discretion by finding that it would be in children's best interest to return to Texas, although not analyzing noncustodial parent's mobility in opinion); *In re Interest of C.R.O.*, 96 S.W.3d 442, 449-50 (Tex. App. 2002) (citing *Lenz* factors and noncustodial father's testimony that he was unable to find suitable position in Hawaii, in affirming trial court's imposition of domicile restriction on children).

made without substantial detriment to Andre's interests and Mr. Murnane's visitation rights, the trial court should also weigh the burden which Mr. Murnane would suffer if he is forced to relocate in order to remain close to Andre against the burden which Ms. Scott will have to bear if she is forced to remain in East Stroudsburg in order to retain custody.<sup>124</sup>

Dictum in *Rampolla*, although not in *Baures*,<sup>125</sup> also suggested that a negotiated agreement might render the noncustodial parent's mobility unimportant.<sup>126</sup> The court's comment here, too, is ill-conceived. The *Rampolla* court emphasized that the parties' settlement agreement seemed to contemplate relocation and did not require that the parties remain in Mercer County. However, the fact that an agreement has a *ne exeat* clause (a provision that restricts a parent's ability to relocate the child, typically absent the other parent's or the court's approval) should not render irrelevant an analysis of the noncustodial parent's mobility. A court would not enforce such an agreement if to do so would be inconsistent with the best interest of the child.<sup>127</sup> Child custody disputes are not governed by contract principles. Courts have an obligation to "independently determine" what is in the child's best interest.<sup>128</sup> If a court is not bound by a *ne exeat* clause in an agreement when the clause is inconsistent with the child's best interest, that same clause should not render irrelevant the consideration of one particular factor that is relevant to a determination of the child's best interest (the noncustodial parent's mobility). That is not to say that a *ne exeat* clause is immaterial to the controversy. Such a clause may affect the court's ultimate determination whether the noncustodial parent *should* be expected to relocate, based on the equities.<sup>129</sup>

<sup>124</sup> Murnane v. Murnane, 552 A.2d 194, 200 (N.J. Super. Ct. App. Div. 1989).

<sup>125</sup> The initial order in *Baures* "restrained either parent from leaving the State with Jeremy." *Baures*, 770 A.2d at 218. Arguably, a negotiated agreement might be relevant to *Baures*'s third factor: "[T]he past history of dealings between the parties insofar as it bears on the reasons advanced by both parties for supporting and opposing the move." *Id.* at 229.

<sup>126</sup> *Tropea* also mentioned that a *ne exeat* clause contained in a separation agreement might be relevant to the best interest analysis, but this was dicta. See *Tropea v. Tropea*, 665 N.E.2d 145, 152 n.2 (N.Y. 1996).

<sup>127</sup> See, e.g., *Lenz v. Lenz*, 79 S.W.3d 10, 14 (Tex. 2002); AM. LAW INST., *supra* note 3, § 2.17, illus. 19; see also *id.* § 2.17 cmt. h.

<sup>128</sup> See *Phillips v. Jordan*, 614 N.W.2d 183, 186 (Mich. 2000); *Zeller v. Zeller*, 2002 ND 35, ¶ 16, 640 N.W.2d 53, 58.

<sup>129</sup> Courts must be careful not to give too much weight to these clauses when the noncustodial parent's mobility was not recognized as an option at the time the

In sum, six jurisdictions recognize the importance of the noncustodial parent's mobility to the relocation analysis, although most jurisdictions do not. While some reasons have been given to limit the importance of this factor even in the jurisdictions where it is recognized, both the factor itself and its limitations have never received much discussion. As the next section demonstrates, the major reform efforts of the last decade have further marginalized the importance of the noncustodial parent's mobility by excluding its consideration altogether.

## II. THE INADEQUACY OF REFORM EFFORTS

Two prominent groups have proposed model legislation for relocation disputes. In 1998, the AAML proposed a Model Relocation Act ("AAML Model Act" or "Act"). In 2002, the ALI published its *Principles of the Law of Family Dissolution* ("ALI Principles"), which contained a section on relocation. Unfortunately neither statutory scheme makes the noncustodial parent's mobility a relevant part of the analysis. Since both were drafted after *Murnane*, *Rampolla*, and *Tropea* were decided, and after the Louisiana Code included this factor,<sup>130</sup> its

omission from the model legislation was presumably an overt policy choice.<sup>131</sup>

### A. AAML Model Act

The AAML Model Act gives a court the power to restrain the relocation of a child,<sup>132</sup> but takes no position on whether a request to

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agreement was entered. Courts typically give the parties' agreement weight because an agreement by the parents is presumed to be in the best interest of the child. See, e.g., *deBeaumont v. Goodrich*, 644 A.2d 843, 846 (Vt. 1994) (citing VT. STAT. ANN. tit. 15, § 666 (1994)). While an agreement to remain in proximity may in fact reflect just such a presumption, an agreement that specifies the location of that proximity may not reflect any sort of assessment of the child's best interest if the noncustodial parent's mobility was not even considered.

<sup>130</sup> See LA. REV. STAT. ANN. § 9:355.12 (2006) (titled "Factors to Determine Contested Relocation").

<sup>131</sup> The drafters of the ALI Principles were clearly aware of the importance of the noncustodial parent's mobility. The reporter's notes mention several cases in which it claims the noncustodial parent's mobility was relevant. See AM. LAW INST., *supra* note 3, § 2.17 cmt. d (citing *Trent v. Trent*, 890 P.2d 1309, 1314 (Nev. 1996), and *Tropea v. Tropea*, 665 N.E.2d 145 (N.Y. 1996)). Contrary to the reporter's notes, *Trent* did not discuss the noncustodial parent's mobility.

<sup>132</sup> AAML, *supra* note 1, art. 4.

relocate is sufficient to trigger a change of custody.<sup>133</sup> A court deciding whether to permit a child's relocation would consider the good faith of the party relocating and the best interest of the child.<sup>134</sup> The Act allows individual states to decide which parent should bear the burden of proof on whether the relocation is in the child's best interest.<sup>135</sup> The Act presents a list of factors to help courts determine the permissibility of a contested relocation.<sup>136</sup> These factors were culled from "[a] wide variety of state statutes, reported decisions and legal articles," with an emphasis on drafting a "manageable list."<sup>137</sup> The noncustodial parent's mobility is absent from the list.

A court applying the AAML Model Act could consider the noncustodial parent's mobility because the Act contains a catchall

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<sup>133</sup> *Id.* § 404 & cmt.

<sup>134</sup> *Id.* § 407.

<sup>135</sup> *Id.* § 407 & cmt.

<sup>136</sup> It says:

Factors to Determine Contested Relocation. In reaching its decision regarding a proposed relocation, the court shall consider the following factors:

- (1) the nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate and with the non-relocating person, siblings, and other significant persons in the child's life;
- (2) the age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
- (3) the feasibility of preserving the relationship between the non-relocating person and the child through suitable [visitation] arrangements, considering the logistics and financial circumstances of the parties;
- (4) the child's preference, taking into consideration the age and maturity of the child;
- (5) whether there is an established pattern of conduct of the person seeking the relocation, either to promote or thwart the relationship of the child and the non-relocating person;
- (6) whether the relocation of the child will enhance the general quality of life for both the custodial party seeking the relocation and the child, including but not limited to, financial or emotional benefit or educational opportunity;
- (7) the reasons of each person for seeking or opposing the relocation; and
- (8) any other factor affecting the best interest of the child.

*Id.* § 405.

<sup>137</sup> *Id.* § 405 cmt.

provision.<sup>138</sup> The Act also welcomes evidence relevant to “the feasibility of preserving the relationship between the non-relocating person and the child through suitable [visitation] arrangements, considering the logistics and financial circumstances of the parties.”<sup>139</sup> Evidence about the noncustodial parent’s mobility would be proper under this latter provision if a state dropped the parenthetical term “visitation” in its statute.<sup>140</sup> Also, it would be proper to consider such evidence if the AAML Model Act is persuasive guidance in a jurisdiction, rather than the law.<sup>141</sup> In such a jurisdiction, “visitation” need not be the only way to preserve the noncustodial parent-child relationship.

Whether it is consistent with the Act’s orientation to consider the noncustodial parent’s mobility is debatable. The Act reflects a robust view of noncustodial parents as free agents. Admittedly, the Act requires noncustodial parents to notify the other parent of a proposed relocation, a novel notification provision for its time,<sup>142</sup> and claims this information “should enhance the relationships between the child and the adults involved.”<sup>143</sup> However, this provision was not intended to restrain the noncustodial parent’s movement.<sup>144</sup> Rather the notification provision was thought useful only because visitation might occur in a different location,<sup>145</sup> and because notification could

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<sup>138</sup> *Id.* § 405(8) (mentioning “any other factor affecting the best interests of the child”).

<sup>139</sup> *Id.* § 405(3).

<sup>140</sup> *But see, e.g.,* OKLA. STAT. ANN. tit. 43, § 112.3(J)(1)(c) (2006) (adopting term “visitation”).

<sup>141</sup> *See, e.g.,* E.G. v. S.G., No. CN97-10889, 1999 Del. Fam. Ct. LEXIS 119, at \*9 (Del. Fam. Ct. Dec. 10, 1999) (applying factors contained in AAML’s Model Relocation Act in addition to factors found in DEL. CODE ANN. tit. 13, § 722 (1999)); Dupre v. Dupre, 857 A.2d 242, 255 (R.I. 2004) (setting forth AAML Model Act and directing that various of its factors should be used to assess whether relocation was in best interest of child).

<sup>142</sup> AAML, *supra* note 1, § 202 & cmt. (calling provision “a relatively dramatic rethinking”).

<sup>143</sup> *Id.* § 202.

<sup>144</sup> *See id.* § 101 cmt. Because of the limited purpose of notification by the noncustodial parent, the noncustodial parent does not have to give any reasons for his move whatsoever, while the relocating custodial parent has to give a brief statement of the specific reasons for the proposed relocation of a child. *Id.* § 203(b)(5). In addition, the custodial parent cannot object to the noncustodial parent’s relocation, although the noncustodial parent could restrain the custodial parent from moving the child, *id.* § 302, and potentially use the proposed relocation as a reason to reopen custody. *Id.* § 404.

<sup>145</sup> *See id.* § 101 cmt.



enhance the enforcement of child support orders.<sup>146</sup> The commentary to the Act clearly expressed the view that “legal action to interfere with an adult’s constitutional right to travel is neither provided nor possible.”<sup>147</sup>

In sum, the authors of the AAML Model Act view the noncustodial parent as an autonomous individual, and this conception is at odds with an expectation that a court applying the Act would encourage the noncustodial parent to relocate with the custodial parent and child. So while the AAML Model Act would not preclude consideration of the noncustodial parent’s mobility in deciding whether to permit the child’s relocation, it is unlikely to foster such an inquiry, especially since the Act does not require or even mention it.

### B. ALI Principles

The ALI’s framework is similar to the AAML’s scheme, but also has some important differences. Similarities include the requirement that both parents give notice to the other parent in the event of a proposed relocation,<sup>148</sup> the inability of the custodial parent to stop the noncustodial parent’s relocation, the view that the noncustodial parent is autonomous, and the irrelevance of the noncustodial parent’s mobility to an adjudication of the custodian’s relocation request. The most important difference, and the focus of this discussion, is the ALI’s articulation of a clear and detailed standard for when relocation may result in a change of a parent’s custodial responsibilities.

The ALI approach permits relocation if it will not significantly alter the other parent’s custodial responsibilities.<sup>149</sup> If possible, the court should revise the parenting plan to accommodate the relocation without changing the proportion of each parent’s custodial responsibilities.<sup>150</sup> If, however, a relocation would significantly affect the allocation of custodial responsibilities, then a relocation is a

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<sup>146</sup> See *id.* § 202 cmt.

<sup>147</sup> *Id.*

<sup>148</sup> See AM. LAW INST., *supra* note 3, § 2.17(2). Unlike the AAML Model Act, see *supra* note 144, this would include “the specific reasons for the intended relocation.” *Id.* § 2.17(2)(c) & cmt. c.

<sup>149</sup> A relocation is a “substantial change in circumstances” 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.” *Id.* § 2.17(1).

<sup>150</sup> *Id.* § 2.17(3).

substantial change of circumstance and the court's approach to the relocation will depend upon whether the parent seeking to move has been exercising "the clear majority of custodial responsibility," an equal amount of custodial responsibility, or "substantially less custodial responsibility . . . than the other parent."<sup>151</sup>

The parent who exercises the clear majority of custodial responsibility is allowed to relocate "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>152</sup> A parent who satisfies these criteria need not prove that the move is in the child's best interest,<sup>153</sup> and the court may not prevent the relocation "simply because it determines that such a relocation would not, on balance, be best for the child."<sup>154</sup> Consequently, some custodial parents may be able to move with the child even though the relocation might impair the noncustodial parent's visitation,<sup>155</sup> although the court must explore alternative arrangements to minimize the potential effect on the parent-child relationship caused by the relocation.<sup>156</sup> If the applicant cannot demonstrate that the relocation is for a valid purpose, in good faith, and to a location that is reasonable in light of its purpose, the court can reallocate primary custodial responsibility if the child's best interest warrants it. In making that determination, the court must consider whether the child's best interest would be better served by relocation with the applicant or by remaining with the other parent.<sup>157</sup> In contrast, a request for relocation from an applicant in category two — where neither parent has been exercising a clear majority of custodial responsibility — is addressed by modifying the parenting

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<sup>151</sup> See *id.* § 2.17(4). The court must modify the parenting plan in accordance with the child's best interest, as defined in sections 2.08 and 2.09, but also in accordance with specific principles set forth in section 2.17(4). See *id.*

<sup>152</sup> See *id.* § 2.17(4)(a). The ALI Principles spell out some valid purposes, including "a significant employment or educational opportunity," "to be close to significant family or other sources of support," and "to significantly improve the family's quality of life," see *id.* § 2.17(4)(a)(ii), and allow other purposes to be valid so long as the relocating parent proves the validity of the purpose. *Id.* § 2.17 cmt. d. The ALI Principles also specify that a move is reasonable "unless its purpose is shown to be substantially achievable without moving, or by moving to a location that is substantially less disruptive of the other parent's relationship to the child." *Id.* § 2.17(4)(a)(iii).

<sup>153</sup> *Id.* § 2.17 cmt. a.

<sup>154</sup> *Id.* § 2.17 cmt. d.

<sup>155</sup> See *id.* § 2.17 illus. 10, 16.

<sup>156</sup> *Id.* § 2.17(4)(e).

<sup>157</sup> *Id.* § 2.17(4)(b).

plan in accordance with the child's best interest.<sup>158</sup> A parent in the third category — one who has exercised substantially less custodial responsibility than the other parent — is unable to relocate with the child unless it is necessary to prevent harm to the child.<sup>159</sup>

The mobility of the noncustodial parent is arguably relevant to various parts of this rule structure. Its greatest potential significance is to the threshold inquiry of whether the relocation constitutes a "substantial change of circumstances."<sup>160</sup> If the noncustodial parent can relocate too, then the child's relocation would not "significantly impair" the noncustodial parent's ability to exercise responsibilities under the parenting plan.<sup>161</sup>

The ALI Principles do not discuss the noncustodial parent's ability to relocate with respect to this threshold inquiry, and this omission will undoubtedly mean that many lawyers will not make the argument even if it might help their clients. While the ALI framework does not preclude the argument, and in fact describes the examination as an extremely open-ended one,<sup>162</sup> the commentary steers lawyers and litigants away from considering the noncustodial parent's mobility. The commentary mentions only three relevant factors in its discussion of the changed-circumstances inquiry: "[t]he amount of custodial responsibility each parent has been exercising and for how long, the distance of the move and its duration, and the availability of alternative visitation arrangements."<sup>163</sup> In addition, the drafters'

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<sup>158</sup> *Id.* § 2.17(4)(c).

<sup>159</sup> *Id.* § 2.17(4)(d). The commentary suggests that parental agreements can make a difference to outcome. *See id.* § 2.17 cmt. h (noting more relaxed requirements for modifying parenting plan where there is agreement to do so).

<sup>160</sup> *Id.* § 2.17(1). The noncustodial parent's mobility may be relevant to an evaluation of the child's best interest when both parents share custodial responsibility. *See id.* § 2.17(4)(c). It might also be relevant to a determination of the child's best interest if a parent with the majority of custodial responsibility cannot establish that the new location is reasonable in light of the purpose. *Id.* § 2.17(4)(b). A court may find that the noncustodial parent's mobility is best addressed in these other parts of the analysis, and not as part of the threshold inquiry of whether the relocation constitutes a substantial change of circumstances. If it were relevant to the threshold inquiry, a court might never get to the question whether the relocating parent is moving for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose. *See* § 2.17(4). Those issues may be too important not to address.

<sup>161</sup> *See id.* § 2.17(1).

<sup>162</sup> The commentary says this section "sets forth no precise formula for what constitutes significant impairment because the relevant factors are too numerous and varied." *Id.* § 2.17 cmt. b.

<sup>163</sup> *Id.*

discussion of an intra-city relocation, with no mention of the noncustodial parent's potential mobility, leads readers to conclude that the noncustodial parent's mobility is in fact irrelevant. The example deems an intra-city relocation a "significant impairment" if it requires the noncustodial parent to travel two hours each way to see the child, thereby interrupting the daily contact that had existed.<sup>164</sup> The ALI Principles do not mention, let alone encourage, a parallel move by the noncustodial parent, even within an hour of the child, in order to avert "significant impairment" of that parent's custodial responsibilities. The failure of the ALI Principles to make the noncustodial parent's mobility overtly relevant to the rule structure may be attributable to the drafters' belief that the autonomy of each parent should be given priority in the relocation context. The commentary specifically states: "These Principles are consistent with the modern view of divorce that one of its primary purposes is to allow each party to go his or her own way."<sup>165</sup>

Courts adopting the ALI Principles have in fact ignored the noncustodial parent's mobility. In *Hawkes v. Spence*,<sup>166</sup> "the salient question [on appeal was] whether, considering the relevant criteria, the proposed relocation would significantly impair father's relationship with the parties' children."<sup>167</sup> The Supreme Court of Vermont adopted the ALI provision defining when relocation constitutes a substantial change of circumstances permitting a court to reallocate custodial responsibility, and analyzed only the three factors mentioned in the ALI commentary: "(1) the amount of custodial responsibility that each parent has been exercising, and for how long, (2) the distance of the move and its duration, and (3) the availability of alternative visitation arrangements."<sup>168</sup> The court's analysis led it to

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* § 2.17 cmt. a.

<sup>166</sup> 878 A.2d 274 (Vt. 2005).

<sup>167</sup> *Id.* at 281.

<sup>168</sup> *Id.* at 278, 279 & n.6. In both of the two consolidated cases, the family court had permitted the mothers to relocate with their children, holding that relocation alone could never support a finding of changed circumstances. The Supreme Court of Vermont reversed and remanded in both cases. The court found that that the mother's move in *Hawkes* "plainly demonstrated changed circumstances" and remanded for a consideration of the best interest of the child. *Id.* at 281. The court itself evaluated whether the mother's relocation would impair the father's ability to exercise his parental rights and responsibilities. It noted that the parents had shared custodial time equally in the recent past, that the mother was moving hundreds of miles from Vermont, and that the alternative visitation arrangements crafted by the family court reduced the father's time with his daughter by about one-third, "thereby

reverse two lower courts' orders permitting mothers to relocate. The appellate court gave no indication that the fathers' mobility should be considered by the trial court on remand.

Neither the AAML nor the ALI explicitly makes the noncustodial parent's mobility a factor in the analysis. As suggested, that consideration can be relevant to the outcome under either framework. The next Part explains why courts should, in fact, always examine the noncustodial parent's mobility no matter what doctrinal structure exists in their jurisdictions for resolving these disputes.

### III. THEORETICAL JUSTIFICATIONS FOR EXPLORING THE NONCUSTODIAL PARENT'S MOBILITY

Courts and legislatures should make the noncustodial parent's mobility an explicit part of the relocation analysis for at least three reasons. First, the factor is relevant to an assessment of the child's best interest. Second, its consideration is necessary if relocation law is to treat men and women equally. Third, its omission undermines the vision of parenting as a partnership. This Article focuses on these particular justifications because they already influence custody law, including, in some places, relocation law.<sup>169</sup>

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having the potential to significantly interfere with their relationship." *Id.* at 280. In support of its finding of changed circumstances, it cited the ALI commentary: "[A] relocation several hundred miles away will ordinarily constitute changed circumstances, unless the prior pattern of visitation has been so infrequent that the additional burden imposed on a parent by the longer distance is not significant." *Id.* The court did not consider the noncustodial parent's mobility or require an examination of it on remand in connection with determining the child's best interest. In fact, the appellate opinion in *Hawkes* provides no information at all to assess whether the father might have been able to relocate too. While the opinion contains information about the reasons for the mother's move, the mother's employment in both locations, and her fiancé's reasons for moving, the opinion provides no information at all about the father's possible mobility. *Id.* at 275-76.

The omission was also evident in *Hawkes*'s companion case, *Lacaille v. Hardaker*. The Vermont Supreme Court remanded so the trial court could reconsider whether there were changed circumstances, and if so, whether the child's relocation with the custodian was in the child's best interest. As to the changed circumstances, the court noted that "the distance of the move may make it difficult for the family court to fashion a visitation schedule that does not reduce, or alter the nature of, father's substantial parent-child contact." *Id.* at 282. Yet again, there is no information at all about the father's potential mobility, and no instruction to the trial court that the noncustodial parent's mobility is relevant to either prong of its analysis on remand.

<sup>169</sup> The Article takes no position on the merit of some of the alternative recommendations that might be useful for adjudicating relocation cases. See, e.g., Gary A. Debele, *A Children's Rights Approach to Relocation: A Meaningful Best Interests*

### A. Best Interest Ideology

As suggested above, courts adjudicating relocation disputes strive to arrive at decisions that are in the child's best interest. This Article assumes that such an effort is worthwhile and avoids the debate about whether this objective is appropriate or achievable.<sup>170</sup> This Article also assumes the truth of all the diverse psychological research that courts cite in their analyses of children's best interests in the relocation context. At least some children, and probably a great number, are benefited by having (1) stability in their relationships, especially with their primary caretaker,<sup>171</sup> (2) a continuing relationship with their noncustodial parent,<sup>172</sup> (3) a custodial parent who is happy, instead of

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*Standard*, 10 J. AM. ACAD. MATRIMONIAL LAW. 75, 78 (1998) (recommending that trained guardian ad litem be appointed in relocation cases to protect best interest of child).

<sup>170</sup> See, e.g., Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 470 (1999) (discussing standard in context of initial custody disputes); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 479 (1984) (arguing for primary caretaker presumption for young children instead of open-ended best interest test); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 7 (1987) (calling best interest standard "indeterminate, unjust, self-defeating, and liable to be overridden by more general policy considerations" and suggesting that parents' interests should be relevant to dispute); Robert M. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 255-61 (1975) (describing indeterminacy of test).

<sup>171</sup> Courts adjudicating relocation disputes have emphasized the importance of stability in custodial arrangements. See, e.g., *Baures v. Lewis*, 770 A.2d 214, 222 (N.J. 2001) (citing Marsha Kline et al., *Children's Adjustment in Joint and Sole Custody Families*, 25 DEV. PSYCHOL. 430, 431 (1989); Wallerstein & Tanke, *supra* note 40, at 311-12); *Frieze v. Frieze*, 2005 ND 53, ¶ 13, 692 N.W.2d 912, 919; *Taylor v. Taylor*, 849 S.W.2d 319, 327-38 (Tenn. 1993); see also Wallerstein & Tanke, *supra* note 40, at 310-11 (identifying three factors as associated with good outcomes for children post-divorce: "(1) a close, sensitive relationship with a psychologically intact, conscientious custodial parent; (2) the diminution of conflict and reasonable cooperation between the parents; and (3) whether or not the child comes to the divorce with pre-existing psychological difficulties").

<sup>172</sup> Warshak, *supra* note 42, at 89-96; see also Braver et al., *supra* note 48, at 206. Wallerstein and Tanke question whether frequent and continuing access to a noncustodial parent "is significantly related to good outcome in the child or adolescent." Wallerstein & Tanke, *supra* note 40, at 312; see also *Baures*, 770 A.2d at 223 ("[R]esearch also affirms the importance of a loving and supportive relationship between the noncustodial parent and the child. . . . [But what] it does not confirm is that there is any connection between the duration and frequency of visits and the quality of the relationship of the child and the noncustodial parent."); FRANK FURSTENBERG & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN*

resentful or depressed,<sup>173</sup> and prospering, instead of failing,<sup>174</sup> and (4) fewer stressors, including “fear of abandonment by one or both parents” and “the diminished capacity of one or both parents to respond to the child’s needs.”<sup>175</sup> In short, this Article accepts as legitimate all of those factors that routinely influence the courts and legislators in their evaluation of children’s best interests and avoids weighing in on the relative significance of these factors.<sup>176</sup> Instead of critiquing the social science research, this Article evaluates whether courts’ ability to determine the child’s best interest based on these sorts of considerations is undermined when courts ignore the mobility of the noncustodial parent.

This Article assumes that an accurate determination of the child’s

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WHEN PARENTS PART 72-73 (1991).

Despite challenges, courts have remained steadfast to the idea, or the promise, of the importance of two involved parents in a child’s life. Most, if not all, courts ask how the move will impact the relationship between parent and child, and whether alternative visitation arrangements can be implemented to minimize or avoid the potential negative impact from the relocation. See, e.g., FLA. STAT. ANN. § 61.13001(7)(c) (West 2006); *Sadler v. Favro*, 23 S.W.3d 253, 258 (Mo. Ct. App. 2000); *Tropea v. Tropea*, 665 N.E.2d 145, 148 (N.Y. 1996); *Gancas v. Schultz*, 683 A.2d 1207, 1210 (Pa. 1996); *Latimer v. Farmer*, 602 S.E.2d 32, 35-36 (S.C. 2004); *Stonham v. Widiastuti*, 79 P.3d 1188, 1196 (Wyo. 2003).

<sup>173</sup> See *Stout v. Stout*, 1997 ND 61916, ¶ 18, 560 N.W.2d 903, 910 (quoting Wallerstein & Tanke, *supra* note 40, at 314-15); Wallerstein & Tanke, *supra* note 40, at 310-11; cf. *Frieze*, 2005 ND at 918, 692 N.W.2d at 921 (citing with approval trial court’s conclusion that “the best interests of the children are implicitly interwoven with the quality of life of the custodial parent”); *Oppegard-Gessler v. Gessler*, 2004 ND 141, ¶ 10, 681 N.W.2d 762, 765.

<sup>174</sup> See *Jones v. Jones*, 885 P.2d 563, 568 (Nev. 1994); *Baures*, 770 A.2d at 223 (“[S]ocial science research has uniformly confirmed the simple principle that, in general, what is good for the custodial parent is good for the child.”); *Lane v. Schenck*, 614 A.2d 786, 791 (Vt. 1992).

<sup>175</sup> Lucy McGough has listed major “sources of stress” for children of divorce and suggests that relocation policy must take these into account. They are the following: “[C]ontinued conflict and hostility between the parents, a decline in economic circumstances, fear of abandonment by one or both parents, the diminished capacity of one or both parents to respond to the child’s needs[,] . . . diminished contact with familiar sources of psychosocial support and familiar living settings . . . [and] the remarriage of the relocating parent.” See Lucy S. McGough, *Starting Over: The Heuristics of Family Relocation Decision Making*, 77 ST. JOHN’S L. REV. 291, 322-23 (2003) (citations omitted).

<sup>176</sup> Some courts recognize the conflicting nature of the social science research. See, e.g., *Ciesluk v. Ciesluk*, 113 P.3d 135, 149-50 (Colo. 2005) (en banc); *Dupre v. Dupre*, 857 A.2d 242, 256 (R.I. 2004). For an excellent article reviewing the research and noting the strength of some studies over others, see generally Bruch, *supra* note 31.

best interest requires that the court consider all relevant information. The essential question, therefore, is whether the noncustodial parent's mobility is relevant to a determination that relocation is or is not in the child's best interest. Unequivocally, the answer is yes.

### 1. The "Irreconcilable Conflict" Cases

Most obviously, this information has the potential to make reconcilable the otherwise "irreconcilable conflict"<sup>177</sup> between the custodial parent's desire to move (and any benefit that might inure to the children) and the noncustodial parent's desire to maintain an adequate relationship with the children. Courts care deeply about the effect of relocation on the noncustodial parent's relationship with the child,<sup>178</sup> and courts routinely consider whether visitation can be restructured to maintain the parent-child relationship. A review of relocation cases indicates that many disputes ultimately come down to this sort of conflict. Judge Peterson reports that an inability to adequately restructure visitation is the "primary" reason why custodial parents are not allowed to relocate.<sup>179</sup> Consequently, the mobility of the noncustodial parent potentially affects the outcome of any dispute in which the court would deny the relocation because the parent-child relationship would suffer from a change in the quality or quantity of visitation.<sup>180</sup>

A court's inability to fashion an appropriate visitation schedule says absolutely nothing about the noncustodial parent's ability to move

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<sup>177</sup> See *supra* text accompanying note 1.

<sup>178</sup> See, e.g., *Brown v. Brown*, 621 N.W.2d 70, 85 (Neb. 2000); *Wild v. Wild*, 696 N.W.2d 886, 901-02 (Neb. Ct. App. 2005); *Farnsworth v. Farnsworth*, 576 N.W.2d 476, 481-82 (Neb. Ct. App. 1998); *Oppgaard-Gessler*, 2004 ND at ¶ 15, 681 N.W.2d at 767.

<sup>179</sup> Peterson, *supra* note 12, § 1. The significance of this fact was evident in a recent article giving advice to practitioners opposing a parent's relocation. It instructed them to emphasize how "a substitute visitation schedule is not feasible." See David N. Hofstein, Ellen Goldbert Weiner & Scott J.G. Finger, *A Moving Case for Staying Put: Opposing Relocation at Trial*, FAM. ADVOC., Spring 2006, at 25, 26-27.

<sup>180</sup> Some courts say that relocation cannot be denied just because the existing pattern of visitation will change, so long as visitation can be restructured to continue the relationship between the noncustodial parent and child. See, e.g., *Effinger v. Effinger*, 913 S.W.2d 909, 913 (Mo. Ct. App. 1996); *D'Onofrio v. D'Onofrio*, 365 A.2d 27, 30 (N.J. Ch. 1976); *Stout v. Stout*, 1997 N.D. 61 ¶ 36, 560 N.W.2d 903, 914. However, if the court thinks the custodial parent will not comply with the new schedule, permission to relocate is typically denied. See, e.g., *Negaard v. Negaard*, 2002 ND 70, ¶¶ 15-18, 642 N.W.2d 916, 922-23.



with the custodian and child. These are fundamentally different scenarios, with entirely distinct logistical considerations. For example, a court might think an alternative visitation schedule is not feasible because of its cost.<sup>181</sup> However, relocation may be much cheaper than the ongoing expense of long-distance visitation. The expense is nonrecurring, an employer may pay relocation expenses, a person may be able to deduct the cost as a business expense,<sup>182</sup> and a person's cost of living may decline in the new locale.

*Wild v. Wild* suggests the importance of these practical differences.<sup>183</sup> Nebraska requires the custodial parent to establish a legitimate reason for the move before a court even considers the child's best interest.<sup>184</sup> In *Wild*, the appellate court found that the custodial parent's motives were not legitimate because the custodial parent's increase in salary after the relocation would be erased by the custodial parent's need to bear the cost of visitation by the noncustodial parent.<sup>185</sup> The court put considerable emphasis on the fact that the \$7,000 yearly increase in salary would be consumed by the costs of facilitating visitation, and therefore the mother's reason for moving was not legitimate. Because other factors also influenced the court,<sup>186</sup> it is impossible to say that the noncustodial parent's ability to relocate with the child would ultimately have made a difference to the outcome. However, had this option existed, it may have eliminated the court's preoccupation with the economics of the custodial parent's decision.

The following two cases are examples of cases in which the noncustodial parent's mobility did make a difference to the relocation analysis. In both cases, the fact that the noncustodial parent could relocate with the custodial parent and child was instrumental to the court's decision to permit the relocation. The first case, *Harder v. Yandoh*,<sup>187</sup> was litigated in New York where the appellate case law (*Tropea*) explicitly makes the noncustodial parent's mobility relevant.

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<sup>181</sup> *Clements v. Clements*, 906 So. 2d 952, 954 (Ala. Ct. App. 2005); *Morrill v. Morrill*, No. COA05-691, 2006 WL 278925, at \*1-3 (N.C. Ct. App. Feb. 7, 2006); *Maurer v. Maurer*, 758 A.2d 711, 712 (Pa. Super. Ct. 2000).

<sup>182</sup> See 26 U.S.C. § 217 (2006).

<sup>183</sup> 696 N.W.2d 886 (Neb. Ct. App. 2005).

<sup>184</sup> *Id.* at 886.

<sup>185</sup> *Id.* at 896.

<sup>186</sup> The court discounted the fact that the custodial parent was moving to be closer to her fiancé and listed many reasons why it did not find the move legitimate (e.g., there was no evidence of career advancement in the job, and the job would not move her closer to extended family). *Id.* at 896-97.

<sup>187</sup> 644 N.Y.S.2d 83 (N.Y. App. Div. 1996).

The second case, *Fisher v. Fisher*,<sup>188</sup> was litigated in a place where the doctrine ignores the noncustodial parent's mobility, but the noncustodial parent relocated during the proceedings and the courts there accorded it significance.

In *Harder*, the mother and father were awarded joint custody, with primary placement to the father and extensive visitation to the mother.<sup>189</sup> A clause in the divorce order, entered pursuant to a stipulation of settlement, prohibited either parent from changing the children's residence without the other parent's or court's permission.<sup>190</sup> A dispute arose when the father moved sixty-five miles away from the mother, without permission, whereas he previously lived fifteen miles away.<sup>191</sup> The mother sought sole custody and a finding of contempt for the father's unilateral decision to move.<sup>192</sup> The trial court permitted the move, finding it justified for both medical and financial reasons and in the best interest of the children.<sup>193</sup> It then awarded the father sole custody, finding that the dispute suggested that the joint custody arrangement was not working.<sup>194</sup> The court awarded the mother visitation, but suspended any midweek visitation until the parties again lived within thirty minutes of each other.<sup>195</sup>

*Tropea* was decided while the appeal was pending and the appellate court considered the evidence in *Harder* in light of *Tropea*.<sup>196</sup> It noted that the father's move was motivated by legitimate reasons (to shorten the difficult commute of the father's pregnant spouse), that the children's new home was more appropriate and would foster cohesiveness, education, and stability for the children and their step-family, and that the noncustodial parent's extensive summer vacations ensured her continued involvement in the children's day-to-day lives.<sup>197</sup> As to the suspension of the midweek visitation, the appellate court specifically mentioned the mother's ability to relocate, noting a relevant factor is "the possibility and feasibility of a parallel move by an involved and committed noncustodial parent as an alternative to

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<sup>188</sup> 137 P.3d 355 (Haw. 2006).

<sup>189</sup> *Harder*, 644 N.Y.S.2d at 84.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 85.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 86.

restricting a custodial parent's mobility."<sup>198</sup> It then upheld the suspension of midweek visitation: "[S]ince respondent is renting an apartment, is unemployed and lives on public assistance, she may well contemplate a move within a half-hour distance to the children's new residence to ensure the resumption of midweek visitation."<sup>199</sup>

The Hawaii Supreme Court's opinion in *Fisher*<sup>200</sup> also illustrates that the noncustodial parent's mobility is relevant to a determination of children's best interests by rendering otiose any sort of speculation about the effect of relocation on the noncustodial parent's relationship with the children. The parties in *Fisher* were divorcing and fighting over custody. The father proposed relocating with the children to Virginia incident to his military reassignment.<sup>201</sup> The mother was the primary caretaker, but the father was very involved with the children. The trial court applied the best interest standard and awarded the parents joint legal and physical custody, and permitted the father to relocate with the children.<sup>202</sup>

The mother appealed, questioning the propriety of the best interest standard in this context and the trial court's application of that standard. The Hawaii Supreme Court affirmed both the use of the best interest standard and the trial court's application of it, noting some testimony suggesting that the move would be best for the children and indicating its reluctance to encroach on the family court's determination.<sup>203</sup> The court's opinion placed emphasis on the fact that "Mother stated that she was willing to move with the children if relocation was permitted,"<sup>204</sup> and cited the custody evaluator's testimony that "Father and Mother had always planned to leave Hawai'i eventually."<sup>205</sup> In fact, by the time the case reached the Hawaii Supreme Court, the mother had already moved to Virginia.<sup>206</sup>

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<sup>198</sup> *Id.* at 85.

<sup>199</sup> *Id.* at 86.

<sup>200</sup> *Fisher v. Fisher*, 137 P.3d 355, 361-65 (Haw. 2006).

<sup>201</sup> *Id.* at 357.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 364.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 359. In conducting the research for this Article, I was occasionally struck by the asymmetry in some men's and women's orientation to relocating with the custodial parent and child. See, for example, *Dellinger v. Dellinger*, 609 S.E.2d 331, 333 (Ga. 2004), where the court noted that if the father were awarded custody, the mother said she "would do 'what is necessary' to provide the children with her presence and time." The father, in contrast, "gave no indication that he would

The mother's mobility was clearly important to an assessment of whether it was in the children's best interest to move from Hawaii. The *Fisher* opinion is striking because it lacks any discussion at all of how the children's move from Hawaii to Virginia might affect their relationship with the mother. Had the mother not relocated, the outcome may have differed, i.e., the court may have found it was not in the children's best interest to relocate with their father to Virginia.

## 2. Other Cases

There are at least three specific categories of relocation cases for which the noncustodial parent's ability to relocate with the custodial parent could be outcome determinative: cases in which the custodial parent relies heavily on the noncustodial parent for social support; cases in which the child has a particularly tenuous tie to the noncustodial parent; and cases in which the parents share joint custody.

Psychologists have identified two types of cases for which the custodial parent's relocation may give rise to particular concerns. The first category is defined by a custodial parent who "has barely enough capacity to parent," and therefore "needs the other parent to share the burden of care."<sup>207</sup> The second category is defined by children with a "tenuous capacity for attachment," such as a child with autism or Asperger's disorder.<sup>208</sup> Children with these disorders often attach to only a few people and "breaking any relationship makes a major difficulty for them."<sup>209</sup> The fact that necessitates caution in these situations — the physical separation of the noncustodial parent and child — disappears if the noncustodial parent relocates with the child and custodian.

The noncustodial parent's mobility should also be extremely relevant to overcoming courts' reluctance to allow a joint custodian to relocate. Some jurisdictions disfavor relocation when the parties share joint custody and impose a more demanding standard on a joint custodian than on a sole custodian.<sup>210</sup> For example, in *Mason v.*

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consider returning to Alabama to be near his children" if the mother were given custody and relocated. *Dellinger*, 609 S.E.2d at 334 n.4.

<sup>207</sup> Samuel Roll & Candace Kern, *What a Move May Mean for the Child*, FAM. ADVOC., Spring 2006, 34, 37.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Mason v. Coleman*, 850 N.E.2d 513, 517-18 (Mass. 2006); *Sydnes v. Sydnes*, 388 N.W.2d 3, 5-6 (Minn. Ct. App. 1986); *Brown v. Brown*, 621 N.W.2d 70, 78 (Neb.

*Coleman*,<sup>211</sup> the Supreme Judicial Court of Massachusetts affirmed a trial court decision denying the mother permission to relocate the children to Bristol, New Hampshire, some seventy miles from the father.<sup>212</sup> The relevant statute permitted the court to authorize removal only upon “cause shown,” which the court interpreted to mean if the removal was in the children’s best interest considering all the circumstances and relevant factors.<sup>213</sup> The court gave considerable weight to the fact of shared custody: “Where physical custody is shared, a judge’s willingness to elevate one parent’s interest in relocating freely with the children is often diminished.”<sup>214</sup> While denying that joint physical custody foreclosed the possibility of relocation, the court suggested that the custodial parent’s hurdle was high.

The court differentiated joint custody from sole custody for two reasons. First, a joint custody award suggests that both parents are likely to be equally critical to the child’s development. The court stated:

Where physical custody is shared and neither parent has a clear majority of custodial responsibility, the child’s interests will typically ‘favor protection of the child’s relationships with both parents because both are, in a real sense, primary to the child’s development.’ Distant relocation often impedes ‘frequent and continued contact’ with the remaining joint

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2000); *Jaramillo v. Jaramillo*, 823 P.2d 299, 303 n.3 (N.M. 1991); see AM. LAW INST., *supra* note 3, § 2.17(4)(c); see also TENN. CODE ANN. § 36-6-108(c)(1)-(11), (d) (2006).

<sup>211</sup> *Mason*, 850 N.E.2d at 518.

<sup>212</sup> *Id.* at 515. The parents had agreed to joint physical and legal custody, to stay within 25 miles of Chelmsford, Massachusetts, and to register the child for school in the district of the mother’s residence. The father, with little advance notice to the mother, relocated to Nashua, New Hampshire, 17 miles from Chelmsford, and the mother gave notice, shortly thereafter, of her intention to relocate to Bristol, New Hampshire. Bristol is 86 miles from Chelmsford. *Id.* at 515-16.

<sup>213</sup> *Id.* at 515.

<sup>214</sup> *Id.* at 519. Wallerstein and Tanke believe that when the parents have true joint custody, “[the] parent . . . proposing a move should be required to prove that it is in the best interest of the child, and not merely desired by the moving parent . . . [because] stability and continuity favor protection of the child’s relationships with both parents.” Wallerstein & Tanke, *supra* note 40, at 318. It is notable that the ability of the noncustodial parent to relocate is missing from the list of factors proposed by Wallerstein and Tanke for courts to consider. *Id.* at 319-21.

custodian.<sup>215</sup>

Second, a joint custody award means that the parents have agreed to cooperate with each other in order to make the arrangement successful:

Shared physical custody in particular carries with it a substantial obligation for cooperation between the parents. Such an arrangement, by its nature, involves shared commitment to coordinate extensively a variety of the details of everyday life. . . . It is . . . incumbent on a parent who has been awarded joint physical custody to recognize that the viability of the endeavor is dependent on his or her ability and willingness to subordinate personal preferences to make the relationship work. While a joint physical custody agreement remains in effect, each parent necessarily surrenders a degree of prerogative in certain life decisions, e.g., choice of habitation, that may affect the feasibility of shared physical custody.<sup>216</sup>

The reasons articulated in *Mason* for imposing a higher burden on the joint custodian seeking to relocate *also* support imposing a heightened obligation on the noncustodial parent to relocate with the custodial parent and child when that arrangement would be best for the child. Joint custody might warrant proximity, but joint custody itself does not indicate where the nucleus of the post-divorce family should be located. To the extent joint custody suggests a “shared commitment to coordinate” and to “subordinate personal preferences,” these obligations apply to both parents.

The *Mason* court did not consider the possibility that the father should move with the mother and child, even though its rationale would have supported this solution and even though the father already worked part time in the vicinity of Bristol as a ski instructor.<sup>217</sup> The court should have known that parents sometimes follow their ex-partners and children since the mother of the petitioner’s stepchildren was planning to follow the petitioner, the petitioner’s new husband, and his children to Bristol.<sup>218</sup>

Admittedly, *Mason* may not have been decided differently even if the

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<sup>215</sup> *Mason*, 850 N.E.2d at 519 (citations omitted).

<sup>216</sup> *Id.* at 518.

<sup>217</sup> *Id.* at 520 n.13.

<sup>218</sup> *Id.* at 515-16.

noncustodial parent could have relocated. While the trial court no longer would have been concerned about the father's parenting time,<sup>219</sup> the trial court did articulate several reasons why the move was not in the children's best interest, including a difference in the quality of schools.<sup>220</sup> Nonetheless, *Mason* is important because it demonstrates the myopia courts have with respect to the noncustodial parent's mobility even as they express ideas about joint custody that would fully warrant this factor's consideration.

The noncustodial parent's ability to relocate has significance to an assessment of the child's best interest, and that itself should justify soliciting the information and making it part of the analysis. Additionally, however, this inquiry may also have some positive effects on the manner in which these disputes are resolved, although admittedly, considering this additional factor may increase the time and cost it takes to resolve a dispute.<sup>221</sup> Attention to the noncustodial parent's mobility may increase the number of couples litigating relocation disputes at the time of divorce instead of post-divorce, and increase the number of settlements.

More relocation disputes will presumably be litigated at the time of divorce than afterwards if the noncustodial parent's mobility is made relevant. As described below,<sup>222</sup> numerous factors are relevant to whether the noncustodial parent *should* move, including the mobility of the noncustodial parent's second family. Custodial parents will be encouraged to bring their requests to relocate closer to the time of the divorce because the equities may weigh more heavily in the noncustodial parent's favor as time passes and second families are formed. Channeling a relocation dispute into the initial divorce action should benefit children; it should shorten the time their parents are litigating and consolidate the time during which the children experience the changes that can accompany divorce.<sup>223</sup>

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<sup>219</sup> *Id.* at 517.

<sup>220</sup> In addition, the court mentioned the absence of a financial imperative to move to Bristol, the negative effects from uprooting the children, and allegations of a step-sibling's misconduct all meant the children might be harmed from spending increased time in the mother's household. *Id.*

<sup>221</sup> It would be difficult to quantify the overall effect when the inquiry is so open-ended anyway.

<sup>222</sup> See *infra* text accompanying notes 338-42.

<sup>223</sup> Steve N. Peskind, *Determining the Underterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. ILL. U. L. REV. 449, 476 (2005) ("While the trauma of a contested case is irreparable, the sooner the case concludes, the sooner the children and the parents can start the

In addition, couples may settle a greater number of their relocation disputes if the noncustodial parent's mobility is made more relevant. These disputes are currently some of the most difficult to settle.<sup>224</sup> Each party views the dispute as a zero-sum contest with high stakes. Because the rule of decision in many jurisdictions does not produce a clear winner, parties are encouraged to litigate.<sup>225</sup> Settlements should increase under this Article's proposal as noncustodial parents recognize the benefits this solution offers for their children,<sup>226</sup> and as it makes it more likely that some custodial parents will be able to relocate.

In sum, it may be in a particular child's best interest for the child to relocate with the custodial parent and to have the noncustodial parent follow. The fact that most courts and legislatures ignore the noncustodial parent's mobility seems inappropriate given their expressed objective to act in the child's best interest. The competing interests of "two competent, caring parents" do not have to be "compelling and irreconcilable."<sup>227</sup> Embracing the possibility that the noncustodial parent can, and should, relocate provides a mechanism for solving the conflict. Making the noncustodial parent's mobility relevant to the analysis should also increase the likelihood that some of these relocation disputes will arise and settle closer to the time of the divorce, thereby benefiting the parties, the children, and the system alike.

### B. Equality Ideology

Equality doctrine has permeated family law reforms since at least

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healing process of their post-divorce life."); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 123-24 (1997) (discussing negative effect of litigation on children).

<sup>224</sup> See Valdespino, *supra* note 39, at 20.

<sup>225</sup> *Id.* at 24.

<sup>226</sup> Child custody evaluators can help noncustodial parents understand the benefit of this solution for their children. See William G. Austin, *A Forensic Psychology Model of Risk Assessment for Child Custody Relocation Law*, 38 FAM. & CONCILIATION CTS. REV. 192, 201-03 (2000); Arline S. Rotman et al., *Reconciling Parents' and Children's Interests in Relocation: In Whose Best Interest?*, 38 FAM. & CONCILIATION CTS. REV. 341, 346 (2000) (explaining that court-connected evaluators should use evaluation process as form of dispute resolution "in which the evaluator engages parents (and attorneys) in a process that empowers them to evaluate their own situation, focus on the needs of their children, and understand the criteria and principles involved in crafting parenting arrangements that best meet those needs").

<sup>227</sup> AAML, *supra* note 1, § 405 cmt; see also *supra* note 1.



the 1960s.<sup>228</sup> This Article accepts that orientation, and argues that inattention to the noncustodial parent's mobility ingrains gender bias in the law of relocation.<sup>229</sup> As discussed below, the failure to make the noncustodial parent's mobility an explicit part of the relocation inquiry reflects gendered assumptions and hampers courts in achieving their goal of gender equality in the child custody arena.

The failure to inquire into the noncustodial parent's mobility is partly attributable to gender roles and gendered assumptions. These roles and assumptions are evident from at least the mid-nineteenth century forward. On the rare occasion when courts used to mention the noncustodial parent's mobility, the noncustodial parent was typically female. For example, in the 1938 case of *Bennett v. Bennett*,<sup>230</sup> the Supreme Court of Wisconsin upheld a trial court order permitting the father, who was the custodian, to move from Wisconsin to New York. The trial court's order made it a condition of granting the father's petition that he pay the mother's expenses if she "concludes to change her residence from Wisconsin to the State of New York in order to remain in close contact with her said children."<sup>231</sup> The mother's visitation schedule would stay the same if she decided to move, but the court formulated an alternative schedule in case she did not move.<sup>232</sup> In affirming the order, the Supreme Court of Wisconsin indicated that "the hardships which appellant says have been visited upon her are but difficulties which inevitably must accompany the distressing situation in which she finds herself."<sup>233</sup>

As time went on and custodians were more typically women,<sup>234</sup> the

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<sup>228</sup> See LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY AND RESPONSIBILITY* 60-61 (2006) ("Since the 1960s, public understandings of both marriage and women's citizenship have undergone a significant transformation. This transformation establishes sex equality as an important public value and constitutional principle, and signals a shift from marriage as a hierarchical relationship, premised on gender complementarity, to one of mutual self-government, premised on gender equality."); Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 *LAW & SOC'Y REV.* 769, 770-71 (2004); Lee E. Teitelbaum, *Rays of Light: Other Disciplines and Family Law*, *J.L. & FAM. STUD.* 1, 7 (1999).

<sup>229</sup> Cf. MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 19-35, 79-84 (1991) (emphasizing importance of equality of result, not gender neutrality, in family context).

<sup>230</sup> 280 N.W. 363, 363 (Wis. 1938).

<sup>231</sup> *Id.*.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 364.

<sup>234</sup> See JOHN P. MCCAHEY, *CHILD CUSTODY AND VISITATION LAW AND PRACTICE* 1-19 (1992).

case law seldom mentioned the noncustodial father's mobility as relevant to relocation disputes.<sup>235</sup> Courts probably found it unthinkable that the noncustodial parent (the male) would relocate with the custodial parent (the female). After all, only women traditionally followed their spouses around, in part because the husband's residence established the legal residence of the couple.<sup>236</sup> A man could sue his wife for divorce if she failed to follow him to a particular location, even if he unilaterally initiated the move.<sup>237</sup> In addition, men were historically the breadwinners.<sup>238</sup> Courts rarely would have expected a husband to forego his job to follow his wife to a new location; it would have seemed absurd for a divorced man to do the same for an ex-wife and his child.

Thus, history helps contextualize the irrelevance of the noncustodial parent's mobility and explains its gendered foundation. The fact that the omission persists may be attributable to the same gendered

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<sup>235</sup> See generally *Sage v. Sage*, 245 S.W.2d 398 (Ark. 1952) (affirming change of custody from mother to father after mother's move out of jurisdiction, and noting difficulty father faced in visiting children); *Tanttila v. Tanttila*, 382 P.2d 798 (Colo. 1963) (reversing trial court's order giving mother permission to relocate and noting, inter alia, impact relocation had on father's visitation rights); *Holland v. Holland*, 373 P.2d 523 (Colo. 1962) (affirming trial court's grant of sole custody to father after mother's removal of child from jurisdiction in contravention of custody order); *Brown v. Brown*, 155 N.W.2d 426 (Iowa 1968) (reversing trial court order permitting mother's relocation even though mother and children had been out of state for more than one year and original decree did not prohibit their relocation); *Pelts v. Pelts*, 425 S.W.2d 269 (Mo. Ct. App. 1968) (affirming transfer of custody to father upon mother's relocation with child and noting that relocation rendered it difficult for husband to exercise his custodial rights); *Turney v. Nooney*, 74 A.2d 356 (N.J. Super. Ct. Ch. Div. 1950) (granting father full custody after mother had taken child to India and denied father access); *White v. Lobstein*, 246 S.W.2d 953 (Tex. App. 1952) (affirming order denying mother permission to change residence of child to location of mother's new husband).

<sup>236</sup> 1 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 4.3, 268 (2d ed. 1987); see, e.g., CAL. CIV. CODE § 156 (1872) ("The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto."); see also Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, 46 KAN. L. REV. 433, 438-39 (1998).

<sup>237</sup> See FRANK KEEZER, *THE LAW OF MARRIAGE AND DIVORCE: GIVING THE LAW IN ALL THE STATES AND TERRITORIES WITH APPROVED FORMS* § 148, at 78 (1906).

<sup>238</sup> Marion Crain, "Where Have All the Cowboys Gone?" *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1878, 1903-04, 1917-18 (1999) (discussing traditional role of male as breadwinner); Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89, 90, 115-16 (1998) (discussing traditional role of male as breadwinner).

assumptions. Professors Joan Williams and Marion Crain persuasively argue that individuals today internalize gender roles of the past. Williams has explained how the notion of domesticity still produces strong social norms that men are the “breadwinners” in a family and women should follow men.<sup>239</sup> Crain documents that many men and women in intact families still hold views consistent with the historic role division,<sup>240</sup> and that many individuals, stressed by the pressures of work and family, even long for a return to the gendered roles of the past.<sup>241</sup> These role expectations do not evaporate upon divorce. Rather, they manifest themselves in new contexts, such as who should be the custodial parent, who should pay the majority of child support, and who should sacrifice personal fulfillment for the children of the dissolved family.<sup>242</sup> Many judges in fact evince quite conservative views about gender roles,<sup>243</sup> and their failure to consider the noncustodial parent’s mobility may reflect these views. Chief Judge Schwartz made this point bluntly:

[The decisions] which exalt the father’s convenience in seeing the children at the place he makes his living over a sincere desire of the mother to live where she wishes . . . are informed by a thoroughly indefensible attitude that the mother’s personal wishes are somehow less worthy and valuable than the desires of the male parent and the preference accorded the

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<sup>239</sup> Williams, *supra* note 238, at 123 (“When the opera singer Beverly Sills left New York to follow her husband to Cleveland, she felt that, ‘My only alternative was to ask Peter to scuttle the goal he’d been working toward for almost twenty-five years. If I did that, I didn’t deserve to be his wife.’ No ‘good’ wife would want to rob her husband of full masculinity: this is why researchers find such unquestioned support for men’s careers. This is the second constraint . . . contemporary women, carry over from domesticity.”); see also Bowermaster, *supra* note 236, at 443 (noting how “[c]ouples still tend to live in the place chosen by the husband, usually to accommodate his employment”).

<sup>240</sup> Crain, *supra* note 238, at 1904.

<sup>241</sup> *Id.* at 1879.

<sup>242</sup> See Charles D. Hoffman & Michelle Moon, *Mothers’ and Fathers’ Gender-Role Characteristics: The Assignment of Post-Divorce Child Care and Custody*, 42 *SEX ROLES* 917, 923 (2000) (discussing prevalence of custody awards to mothers and reasons for that, including “gender-consequent characteristics stereotypically associated with mothers and fathers”).

<sup>243</sup> Patricia Yancey Martin, John R. Reynolds & Shelley Keith, *Gender Bias and Feminist Consciousness Among Judges and Attorneys: A Standpoint Theory Analysis*, 27 *SIGNS* 665, 681-82 (2002); see also *Report of the New York Task Force on Women in the Courts*, 15 *FORDHAM URB. L.J.* 11, 17-18 (1986) (“Cultural stereotypes of women’s role in marriage and in society daily distort courts’ application of substantive law.”).

place where he pursues the money-making function he still so often performs in our society.<sup>244</sup>

Mention must also be made of the unequal effect the current law has on men and women. Women tend to be the custodial parents seeking to relocate.<sup>245</sup> Men, who are typically the noncustodial parents, have an unfettered ability to relocate. Noncustodial parents routinely move away from their children<sup>246</sup> and courts reconfigure visitation without hesitation in order to accommodate their relocations.<sup>247</sup> Courts virtually never ask the noncustodial parent whether the move is in good faith (e.g., is the noncustodial parent moving simply to “punish” a custodial parent), in the child’s best interest, or harmful to the noncustodial parent’s relationship with his child. Nor do courts ask how the noncustodial parent’s move might affect the relationship between the custodial parent and child (for example, will the move cause the custodial parent to lose a regular source of support, thereby straining the custodial parent-child relationship).<sup>248</sup> Simply, noncustodial parents are generally allowed to move and to continue the same relationship with their children after their relocation regardless of how that relocation might ultimately impact the child.

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<sup>244</sup> See *Hill v. Hill*, 548 So. 2d 705, 707-08 (Fla. Dist. Ct. App. 1989) (Schwartz, C.J., specially concurring) (calling it “invidious distinction” and noting that it would make “more sense to require the father to move entirely to the mother’s chosen home so as to exercise his access to the children, as the reverse requirement” when children’s welfare is only concern).

<sup>245</sup> Glennon, *supra* note 38, at 27 (noting 90% of parents seeking to relocate were women); J. Thomas Oldham, *Limitations Imposed by Family Law on a Separated Parent’s Ability to Make Significant Life Decisions: A Comparison of Relocation and Income Imputation*, 8 DUKE J. GENDER L. & POL’Y 333, 333 (2001) (discussing gender effects of ALI’s relocation rules and noting that most primary custodians are women); see also Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 U. LOUISVILLE J. FAM. L. 791, 846 (1992) (finding in 200 cases surveyed, only eight involved custodial fathers seeking to remove children).

<sup>246</sup> Braver et al., *supra* note 48, at 212 (explaining that about half of all relocations involve father relocating away from child and mother, instead of mother and child relocating away from father).

<sup>247</sup> See, e.g., *In re Marriage of Murga*, 163 Cal. Rptr. 79, 81 (Ct. App. 1980). The ALI Principles recommend that courts reconfigure parenting plans to accommodate noncustodial parent’s relocations. AM. LAW INST., *supra* note 3, § 2.17 cmt. f.

<sup>248</sup> See *In re Marriage of Hamilton-Waller*, 123 P.3d 310, 316 (Or. Ct. App. 2005) (“There may well be circumstances where the support of the custodial parent by the noncustodial parent, or others, is so extensive or important that the loss of that support would have a serious detrimental effect on the parenting capacity of the custodial parent.”); cf. Wallerstein & Tanke, *supra* note 40, at 315, 324-29 (explaining that parental depression can impact quality of parenting).

Achieving total equality, however, is unrealistic. To achieve comparable mobility for custodial and noncustodial parents, the law must either restrict noncustodial parents' mobility or enhance custodial parents' mobility. Pragmatism cautions against efforts to restrict noncustodial parents' mobility or to eliminate all restrictions on custodial parents' mobility. Therefore, this Article wastes no time assessing the merits of these possibilities. Rather, this Article's proposal — that courts should closely examine the noncustodial parent's mobility when the custodial parent requests permission to relocate — would bring *greater parity* into the law. Since the noncustodial parent's strongest claim to opposing the child's relocation is the potential damage to his continued relationship with the child, and since this argument disappears if the noncustodial parent can relocate too, courts will enhance the mobility of custodial parents if they examine the noncustodial parent's mobility.

Judges and policymakers should be concerned that the law rests on gendered assumptions and has a gendered impact. Such law is unfair to individuals who may not have ordered their lives according to traditional roles, who may find their gender roles after divorce very different from their roles during marriage, or who may never have understood or agreed that their role as a caregiver had implications for their mobility after divorce.<sup>249</sup> In fact, gender roles tend to become less rigid upon family break-up. Both parties may partake more in the activities that were traditionally associated with the other parent's gender.<sup>250</sup> Men may be awarded sole or joint custody,<sup>251</sup> and women

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<sup>249</sup> Approximately 60% of women and 77% of men work during marriage. See Bureau of Labor Statistics, Table 4: Employment Status by Marital Status and Sex, 2005 Annual Averages, *available at* <http://www.bls.gov/cps/wlf-table4-2006.pdf> (last visited Apr. 18, 2007). In contrast, approximately 71% of divorced women and 73% of divorced men are employed. *Id.*

<sup>250</sup> That is not to deny that there are patterns consistent with gender. For example, women "usually have the predominant role in the care of the children at the time of initial separation." ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 163 (1992). In addition, Maccoby and Mnookin demonstrated that custodial relationships do not necessarily reflect the original arrangements agreed to by the parties; mothers often have *de facto* custody even in joint custody arrangements. See *id.* at 170 (noting that "among children living with their fathers or in dual residence . . . only half lived there all along").

<sup>251</sup> See Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 14 *WOMEN'S RTS. L. REP.* 175, 177 (1992) (citing 1977 study of individuals in Los Angeles county by Lenore J. Weitzman and Ruth B. Dixon that found "63% of all fathers who requested custody in court papers were successful"). According to one study, custody was awarded to women solely in

may increase their labor force participation after divorce.<sup>252</sup> In addition, such law is out of step with contemporary values. Today the norm is gender equality, not gender inequality, as reflected in state and federal constitutional doctrine,<sup>253</sup> as well as international law.<sup>254</sup> The norm of gender equality has infiltrated family law, affecting a woman's obligation to follow her husband,<sup>255</sup> property awards at divorce,<sup>256</sup> and initial custody determinations.<sup>257</sup> It is no longer acceptable for courts to assume that noncustodial parents cannot or should not move when those assumptions are merely based on stereotypical views of gender roles, and when it has a disparate impact on women.

Some courts already express a desire to make relocation doctrine more fair,<sup>258</sup> noting the disparate impact restrictive relocation rules have on women,<sup>259</sup> and acknowledging the needs of both parents to

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approximately 72% of the cases, to men solely in approximately 9% of the cases, and to the couple jointly in approximately 16% of the cases. See Sally C. Clark, *Advance Report of Final Divorce Statistics, 1989 and 1990*, MONTHLY VITAL STAT. REP., Mar. 22, 1995, at 24 tbl.17, available at [http://www.cdc.gov/nchs/data/mvsvr/supp/mv43\\_09s.pdf](http://www.cdc.gov/nchs/data/mvsvr/supp/mv43_09s.pdf).

<sup>252</sup> William R. Johnson & Jonathan Skinner, *Labor Supply and Marital Separation*, 76 AM. ECON. REV. 455, 468 (1986); Robert Michael, *Consequences of the Rise in Female Labor Force Participation Rates: Questions and Probes*, 3 J. LAB. ECON. S117, S139-40 (1985).

<sup>253</sup> See, e.g., CAL. CONST. art. I, § 31; see also U.S. CONST. amend. XIV, § 1; Craig v. Boren, 429 U.S. 190, 210 (1976).

<sup>254</sup> Convention on the Elimination of All Forms of Discrimination Against Women art. 13, opened for signature Mar. 1, 1980, 1249 U.N.T.S. 14, reprinted in 19 I.L.M. 33, 34; Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, Europ. T.S. No. 5 (entered into force Sept. 3, 1953), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

<sup>255</sup> CLARK, *supra* note 236, at § 4.3, 270.

<sup>256</sup> See Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 99 (2004); Laura M. Padilla, *Gendered Shades of Property: A Status Check on Gender, Race, and Property*, 5 J. GENDER RACE & JUST. 361, 372 (2002).

<sup>257</sup> See FINEMAN, *supra* note 229, at 79. But see Artis, *supra* note 228, at 770, 774-75 (analyzing to what extent judges continue to rely on idea of tender years doctrine in their application of best interest test and finding over half of judges interviewed did so).

<sup>258</sup> *Hollandsworth v. Knyzewski*, 79 S.W.3d 856, 874 (Ark. App. Ct. 2002) (Griffen, J., concurring); *Taylor v. Taylor*, 849 S.W.2d 319, 330-31 (Tenn. 1993); *Hemphill v. Hemphill*, 572 N.Y.S.2d 689, 693 (N.Y. Sup. Ct. App. Div. 1991); see also *infra* notes 259-60.

<sup>259</sup> This objective is based more on policy than the Constitution. See *In re Marriage of Sheley*, 895 P.2d 850, 855 (Wash. Ct. App. 1995) ("[R]estrictions upon the removal of children are likely to adversely impact women who wish to relocate with their

move on with their lives after divorce.<sup>260</sup> Typically this concern leads courts to decrease the legal barriers to relocation. Yet the failure to

consider the noncustodial parent's mobility means that even reformist efforts are inadequately addressing the gender inequality.

The recent en banc decision by the Colorado Supreme Court in *Ciesluk v. Ciesluk*<sup>261</sup> illustrates how ignoring the noncustodial parent's mobility undercuts the goal of equal treatment.<sup>262</sup> In *Ciesluk*, the parties' divorce decree made the mother the primary residential parent, and gave the parents joint decision-making authority.<sup>263</sup> The mother requested permission to modify parenting time since she wanted to move from Colorado to Arizona for work-related reasons.<sup>264</sup> The trial court refused the mother's request, holding that "parenthood results in some sacrifice and it is better off for parents to remain in close proximity."<sup>265</sup> The trial court gave "substantial weight" to the effect the move would have on the child's relationship with the father, and the mother's failure to establish how the move would "enhance" the child.<sup>266</sup>

The Supreme Court of Colorado reversed and remanded, finding that the trial court had abused its discretion in applying twenty-one statutory factors. The trial court's mistakes included considering factors it should not have considered and failing to consider others,<sup>267</sup>

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children (to the corresponding benefit of men who desire to remain in close geographical contact with their children following divorce)."), *overruled by In re Marriage of Littlefield*, 940 P.2d 1362 (Wash. 1997) (en banc). *But see* D'Onofrio v. D'Onofrio, 365 A.2d 27, 30 n.1 (N.J. Super. Ct. Ch. Div. 1976) (raising possibility that relocation restrictions violate equal protection, but refusing to address it).

<sup>260</sup> See, e.g., *In re Burgess*, 913 P.2d 473, 480-81 (Cal. 1996); *Holder v. Polanski*, 544 A.2d 852, 856 (N.J. 1988).

<sup>261</sup> 113 P.3d 135 (Colo. 2005) (en banc).

<sup>262</sup> See, e.g., *In re Marriage of Murga*, 163 Cal. Rptr. 79, 80-81 (Ct. App. 1980) (affirming order modifying visitation to accommodate noncustodial parent's relocation in light of "strong policy" to "support a continuation of the relationship between a child and his noncustodial parent" even though father had not yet found a job or place to live in the new location).

<sup>263</sup> *Ciesluk*, 113 P.3d at 137.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 138.

<sup>266</sup> *Id.*

<sup>267</sup> For example, the court emphasized the parents' parenting styles, but should not have done so. *Id.* at 148-49. It failed to consider the indirect advantages to the child from moving with his primary caregiver, such as the stability of staying with his mother, the advantages of day-to-day relationships with his relatives in Arizona, and the advantages attributable to his mother's increased happiness from her financial

but “most importantly,” the trial court did not “impose an equal burden on Father to demonstrate the benefits to [the child] using the subsection 14-10-129(2)(c) factors.”<sup>268</sup> The statute required a case-specific factual inquiry to determine if modifying parenting time in a relocation case was in the child’s best interest,<sup>269</sup> but the legislative scheme left the burden of proof unclear. The Supreme Court of Colorado refused to allocate the burden to either parent,<sup>270</sup> and concluded, “each parent shares equally in the burden of demonstrating how the child’s best interests will be impacted by the proposed relocation.”<sup>271</sup> It stressed, “[A] court must begin its analysis with each parent on equal footing; a court may not presume either that a child is better off or disadvantaged by relocating with the majority time parent.”<sup>272</sup>

The court’s reluctance to allocate the burden of proof to either parent rested on a strong commitment to equality. The court’s focus was not explicitly on gender, but rather on the gender-neutral concepts of custodial and noncustodial parents, and the need to treat them equally. It believed the parents had “equally important” constitutional rights at stake.<sup>273</sup> Consequently, Colorado courts had to “promote the best interests of the child while affording protection equally between a majority time parent’s right to travel and a minority time parent’s right to parent.”<sup>274</sup>

While the court thought its approach treated the parties’ equally and honored their equal interests, its approach actually fell short of meeting this goal. The court’s failure to direct the trial court to consider the noncustodial parent’s mobility on remand will most likely mean that it will not be considered. While the Colorado statute has a catch-all provision that would permit the inquiry,<sup>275</sup> and while the trial court has the power to raise the issue sua sponte,<sup>276</sup> its absence from the statutory list and from the *Ciesluk* opinion suggests that the parties

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stability. *Id.* at 148.

<sup>268</sup> *Id.* at 149.

<sup>269</sup> *Id.* at 140-41.

<sup>270</sup> *Id.* at 146.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 147.

<sup>273</sup> *Id.* at 142.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 140 n.11 (citing COLO. REV. STAT. § 14-10-129(2)(c)(IX) (1995)) (allowing trial court to consider “[a]ny other relevant factors bearing on the best interests of the child”).

<sup>276</sup> *Id.* at 147.



and trial court will continue to overlook it on remand. After all, the appellate opinion contains absolutely no information regarding the noncustodial parent's employment, his marital status, his mobility in the past, etc.

Any benefit the court achieves from its equal allocation of the burden of proof is undermined by ignoring the noncustodial parent's mobility. How does this omission impact the objective of equality, accepting *Ciesluk*'s conclusion that if the interests of the custodial and noncustodial parents are equal, the law must treat the parents equally in deciding the relocation dispute? Answering that question requires a more nuanced evaluation of the parties' interests and an assessment of whether they are, in fact, equal. The *Ciesluk* court characterized the noncustodial parent's interest as the right to a relationship with his child and the custodial parent's interest as the right to travel. Yet the noncustodial parent could always have his interest vindicated in the new location, and the custodial parent could always have her interest vindicated by moving without the child. Consequently, the interests really at stake are the noncustodial parent's interest in a relationship with his child *in the current location* and the custodial parent's interest in relocating *with her child*. When the interests are framed precisely, one sees that the parties both are asserting an interest in avoiding personal sacrifice in order to continue their same relationship with their child. The court is equating these interests.

The noncustodial parents' mobility becomes obviously important when the interests are accurately described. The parents' interests may in fact be entirely equivalent, as the *Ciesluk* court suggests, so long as both parents have legitimate and equally weighty reasons behind their decisions either to move or not to move. But a court cannot conclude that the parents' interests in avoiding personal sacrifice are necessarily equivalent without inquiring into the custodial parent's ability to remain *and* the noncustodial parent's ability to move. Courts typically lack information about the noncustodial parent's reasons for staying put, although courts routinely ask custodial parents why they want to move (courts hear about the desire to live with a new spouse, take a better job, attend a particular educational institution, return to an area with social and family support, etc.). Courts instead focus only on whether visitation can be sufficiently restructured. However, without information about a noncustodial parent's mobility, any conclusion about "equally important" interests is based on conjecture.

This analysis suggests that the *Ciesluk* court's decision to allocate the burden of proof to neither party is suspect. To be clear, its

decision to allocate the burden of proof similarly in all cases is understandable. This decision permits consistency across cases and ease of administration. Had the court allowed the burden of proof to shift from case-to-case in accordance with the strength of the parties' respective interests, it would have created a troubling chicken-and-the-egg problem: what burden of proof should courts impose on parties to establish their interests if the interests in turn determine the burden of proof?

What is troubling about *Ciesluk* is its determination that the parties' interests, as a categorical matter, are equally weighty. If one must generalize, there is an excellent reason to say that custodial parents' interests in convenience are greater than the noncustodial parents' interests and to allocate the burden of proof to the noncustodial parent. As a general matter, noncustodial parents are unencumbered, or less encumbered, by day-to-day custodial responsibility. The Nevada Supreme Court recognized this important difference in *Jones v. Jones*:

If either is to sacrifice in this respect, there is indeed less reason to demand the sacrifice to be made by the custodial parent since it is she in the end who must arrange her life in a manner consistent with the day-to-day burdens of simultaneously raising a child and pursuing a career.<sup>277</sup>

The ALI has also acknowledged this reason to differentiate between the parents.<sup>278</sup>

Noncustodial parents may try to argue that their interest in convenience is at least equivalent, if not superior, to the custodial parent's interest by emphasizing that their position maintains the status quo.<sup>279</sup> Some noncustodial parents may also claim they have a

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<sup>277</sup> 885 P.2d 563, 570 (Nev. 1994) (permitting relocation and responding to noncustodial parent's claim that visitation would be made more difficult and expensive); *Helentjaris v. Sudano*, 476 A.2d 828, 832 (N.J. Super. Ct. App. Div. 1984).

<sup>278</sup> AM. LAW INST., *supra* note 3, § 2.17 cmt. d ("This section reflects the policy choice that a parent, like any other citizen, should be able to choose his or her place of residence, and that the job of rearing children after divorce should not be made too financially or emotionally burdensome to the parent who has the majority share of custodial responsibility.").

<sup>279</sup> The Supreme Court of Colorado argued that the noncustodial parent has a greater need for protection of his or her rights at the time of relocation than at the time of the initial custody contest. While "each party is as likely as the other to become the majority time parent based on a best interests analysis," the court thought that after an award is made each party has vested rights in "a specified amount of parenting time and decision-making responsibility." *Spahmer v. Gullette*, 113 P.3d

legitimate expectation about the physical location of the post-divorce family because the parties' separation agreement contained a *ne exeat* clause. Both of these arguments require specific facts to support them. The fact that one's position is consistent with the status quo says little about whether one has a legitimate expectation about the future location of one's child, in part because individuals move with great frequency after divorce as they adjust to new economic, family, and social needs,<sup>280</sup> and because case outcomes have been so fact dependent.<sup>281</sup> While a *ne exeat* clause might give rise to a strong claim that the status quo should be maintained, it seems misguided to give all noncustodial parents the benefit of such clauses when not all agreements contain them. Rather it seems better to assess on an individual basis the effect of a negotiated agreement on a noncustodial parent's claim that he should not be expected to relocate. This approach will allow an individual assessment into both the legitimacy of the expectation and the weight it should receive.<sup>282</sup>

In sum, reconceptualizing the noncustodial parent's opposition to the custodial parent and child's relocation as a request to stay put challenges the conclusion that the noncustodial and custodial parents' interests are necessarily equivalent. As a categorical matter, the noncustodial parent's interest appears less weighty. However, in a particular case, the facts will determine whether the parents' interests are equivalent. The parties' interests would not be equivalent if the noncustodial parent has no good reason to stay put and the custodial parent has a good reason to relocate. Unless a court asks about the

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158, 163 (Colo. 2005). Yet the court also acknowledged that in the post-dissolution situation the parties are on unequal grounds with respect to parental responsibilities. When one focuses on the fact that relocation only affects the place where the noncustodial parent exercises his or her "vested" rights, the difference in parental responsibilities may justify seeing the parties' interests as at least equal, or even characterizing the custodial parent's interest as greater.

<sup>280</sup> See Wallerstein & Tanke, *supra* note 40, at 310 ("It is unrealistic to expect that any family in contemporary American society, whether intact or divorced, will remain in one geographic location for an extended period of time, or that only one parent will wish to move. Because of the instability and unpredictability of the employment market which has been exacerbated by the recent downsizing of business, the high incidence of remarriage, and the high incidence of second divorces, repeated, separate moves by each parent are coming to represent the norm.").

<sup>281</sup> See *supra* text accompanying notes 17-18.

<sup>282</sup> Because courts do not enforce *ne exeat* agreements when they cease to be in a child's best interest, a clause might not give great support to the noncustodial parent's claim that he should not have to relocate. See *supra* notes 127-29 and accompanying text.

noncustodial parent's mobility, however, the court may treat unequal interests as equal and thereby unfairly benefit the noncustodial parent.

In contrast to *Ciesluk*, New Jersey law demonstrates that a commitment to gender equity should lead courts to inquire into the noncustodial parent's mobility. Initially, the commitment to gender equality led to a liberalization of the test governing these disputes, although the noncustodial parent's mobility was not yet a factor. In *Holder v. Polanski*,<sup>283</sup> the Supreme Court of New Jersey modified New Jersey law so that the relocating parent need not establish a real advantage to that parent from the move; rather, any sincere, good faith reason would suffice.<sup>284</sup> Mimicking the rationale in the often-cited case, *D'Onofrio v. D'Onofrio*,<sup>285</sup> the Supreme Court of New Jersey held: "Short of an adverse effect on the noncustodial parent's visitation rights or other aspects of a child's best interests, the custodial parent should enjoy the same freedom of movement as the noncustodial parent."<sup>286</sup> If a move would adversely affect visitation, the court should consider the advantages of the move, the integrity of the motives, and its ability to develop a reasonable visitation schedule. It should generally permit the move unless there is bad faith or the children would suffer from the relocation.<sup>287</sup> Gender equality was the obvious rationale for the liberalization of the rule:

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<sup>283</sup> 544 A.2d 852 (N.J. 1988).

<sup>284</sup> *Id.* at 856. The trial court denied the mother permission to move from New Jersey to Connecticut. The mother had wanted to move to be closer to her family, to attend school, and to put behind her the trauma of the divorce and the loss of her parents. The father opposed the relocation, principally because of the distance. The trial court found that while relocation was beneficial to the mother, the mother had not shown that similar benefits were unavailable in her present location or that being away from the father was in the children's best interest. *Id.* at 854.

<sup>285</sup> *Holder* built on *D'Onofrio v. D'Onofrio*, 365 A.2d 27, 30 (N.J. Super. Ct. Ch. Div. 1976) ("[A] noncustodial parent is perfectly free to remove himself from this jurisdiction despite the continued residency here of his children in order to seek opportunities for a better or different lifestyle for himself. And if he does choose to do so, the custodial parent could hardly hope to restrain him from leaving this State on the ground that his removal will either deprive the children of the paternal relationship or depreciate its quality. The custodial parent, who bears the essential burden and responsibility for the children, is clearly entitled to the same option to seek a better life for herself and the children, particularly where the exercise of that option appears to be truly advantageous to their interests and provided that the paternal interest can continue to be accommodated, even if by a different visitation arrangement than theretofore.").

<sup>286</sup> *Holder*, 544 A.2d at 856.

<sup>287</sup> *Id.* at 857.

Formerly, custody of children of tender years was generally awarded to the mother. With increasing frequency, however, mothers and fathers now share the responsibility for the care and custody of their children and the support of the family. Consequently, courts have begun to make more frequent awards of custody to fathers and, in appropriate cases, to make joint custody awards. Nonetheless, in many instances, the mother still receives custody of the children, and the father is awarded visitation rights. Implicit in that arrangement is the right of the father to move elsewhere for virtually any reason. As men and women approach parity, the question arises when

a custodial mother wants to move from one state to another, why not?<sup>288</sup>

The following year, an intermediate appellate court in New Jersey decided *Murnane* and recognized the importance of inquiring into the noncustodial parent's mobility in order to advance gender equity, citing *Holder* and its emphasis on gender parity.<sup>289</sup> Not long thereafter, the same appellate court decided *Rampolla* and required inquiry into the noncustodial parent's mobility in every relocation case, again emphasizing the need to do so in order to be fair to custodial parents.<sup>290</sup> Eight years later, the New Jersey Supreme Court began its analysis in *Baures* (which required the noncustodial parent to produce evidence regarding his ability to move) by mentioning the need for equity between custodial and noncustodial parents, and recognizing that the topic of mobility had gender implications.<sup>291</sup>

Professor Thomas Oldham has argued that as relocation rules make it easier for the custodial parent to relocate, the rules result in the unequal treatment of men and women. Oldham's argument deserves consideration because this Article suggests the opposite. Oldham's argument rests on a comparison of the rules governing relocation with the rules governing the imputation of income to calculate child support. He contends that these two sets of rules impact the genders

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<sup>288</sup> *Id.* at 854-55 (citation omitted).

<sup>289</sup> *Murnane v. Murnane*, 552 A.2d 194, 200 (N.J. Super. Ct. App. Div. 1989); see *supra* text accompanying note 124.

<sup>290</sup> *Rampolla v. Rampolla*, 635 A.2d 539, 543-44 (N.J. Super. Ct. App. Div. 1993).

<sup>291</sup> *Baures v. Lewis*, 770 A.2d 214, 222 (N.J. 2001); see also *Ireland v. Ireland*, 717 A.2d 676, 683 (Conn. 1998) (liberalizing law of Connecticut and citing *D'Onofrio* and noncustodial parent's ability to relocate as justification for change). For a discussion of the *Baures* cases, see *supra* text accompanying notes 110-21.

differently, with the former favoring women and the latter hurting men.<sup>292</sup> He says:

For many custodial parents, it is very important to have the right to relocate with their minor child. For non-primary custodians, it is similarly important to have the right to change careers, even if the change will reduce their income for a period or permanently. The trends in the law regarding relocation and income imputation are inconsistent. The prevailing view regarding relocation (and the ALI view) reflects a philosophy that the primary custodian should have substantial freedom. The lack of significant barriers to moving suggests a wish not to impede the parent's autonomy due to the fact of parenthood.

In contrast, child support rules seem to be moving in the other direction. A rule consistent with the prevailing relocation approach would give the obligor significant freedom to structure his life and career as he in good faith would choose. This rule would allow an obligor the right to have his child support obligation reduced if he made a good-faith career change that reduced his income. However, most courts ignore voluntary reductions in income by an obligor, with the justification that parenthood substantially limits one's choices.

There is significant tension between these two inconsistent views. Both views generally help women and harm men. It would seem more fair to decide whether parenthood should significantly limit the choices of separated parents and promulgate consistent rules once this decision is made.<sup>293</sup>

Oldham's conclusions rest upon cross-topic comparisons and he makes no claims about gender equality within the separate topics of parental relocation and child support. An examination of these discrete topics suggests parity of treatment does exist within the child support regime, but not within the relocation regime. Child support law imputes income to *both* custodial and noncustodial parents, thereby equally impacting both parents' ability to reduce voluntarily his or her income.<sup>294</sup> However, as already discussed, no parity exists in the relocation context. As far as Oldham's cross-topic comparison is concerned, it is suspect without some detailed discussion of the

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<sup>292</sup> Oldham, *supra* note 245, at 339-40.

<sup>293</sup> *Id.*

<sup>294</sup> See AM. LAW INST., *supra* note 3, § 3.15 & cmt. b.

policy objectives behind the various rules. There may be a perfectly rational reason to accord parents different amounts of autonomy in the context of these two types of disputes. For example, reductions in child support may typically harm children while relocations may typically benefit children.<sup>295</sup> Finally, even assuming that a cross-topic comparison is appropriate, Oldham's conclusion is debatable. If a custodial parent were seeking to relocate in order to reduce her income, a court would not typically permit it. Courts say the move is not in good faith or it is not in the children's best interest if a move will negatively impact the custodial parent's income, even if the move is motivated by a legitimate reason.<sup>296</sup> Consequently, while child support rules may limit a man's freedom to change careers when it will reduce his income, the relocation rules may similarly limit a woman's freedom to relocate when it will reduce her income.

This Article agrees, however, with Oldham's suggestion that society must "decide whether parenthood should significantly limit the choices of separated parents and promulgate consistent rules once this decision is made."<sup>297</sup> This Article has already made the argument for relocation rules that treat the noncustodial parent and custodial parent more equally. The next section argues that parenthood, in fact, should limit the life choices of separated parents, and uses a partnership rationale to further support its argument that courts must consider the noncustodial parent's mobility when deciding whether the custodial parent should be allowed to relocate.

### *C. Partnership Ideology*

"Partnership" has been a dominant theory influencing family law over at least the past quarter century, reflected in the law governing such topics as property division at divorce and child custody. In the custody context, the theory finds expression in legislative policy statements about the importance of both parents' involvement in a child's life and the obligation of parents to share rights and responsibilities to the extent possible. It also finds expression in joint

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<sup>295</sup> See Bruch, *supra* note 31, at 288-89, 291 (discussing reasons why relocation may be in children's interest).

<sup>296</sup> See *Sill v. Sill*, 2006 Ark. App. LEXIS 149, \*13 (Ark. Ct. App. Feb. 15, 2006); *Catron v. Catron*, 708 So. 2d 1022, 1024 (Fla. Dist. Ct. App. 1998). Even the ALI draft requires a relocation for employment purposes to represent an "occupational improvement, judged economically or by some other reasonable measure." AM. LAW INST., *supra* note 3, § 2.17 cmt. d.

<sup>297</sup> Oldham, *supra* note 245, at 340.

custody provisions, mandated parenting classes, mediation requirements, and “friendly parent” criteria.<sup>298</sup>

Partnership ideology has only minimally affected the law of relocation. Courts who have sought to make the law more favorable for relocating parents have shied away from it, perhaps fearing that it would necessitate the imposition of relocation restrictions on custodial parents. Instead, some of these courts have chosen to emphasize equality. Yet custodial parents and their advocates need not fear partnership ideology so long as it is coupled with an emphasis on equality. In fact, that combination has the potential to aid custodial parents, strengthening permissive relocation doctrine and making restrictive formulations more generous to custodial parents. The notion of partnership suggests that *both* parents have an obligation to act together to do what is best for their child. It permits the custodial parent to relocate and obligates the noncustodial parent to make a parallel move if that combination would be best for the child.<sup>299</sup>

The problem with emphasizing equality without also emphasizing partnership is evident in California. The California Supreme Court made it easier for custodial parents to relocate in *In re Marriage of Burgess*, stressing the need for gender parity. The court in *Burgess* said that relocation law should address “the ordinary needs for *both* parents after a marital dissolution to secure or retain employment, pursue educational or career opportunities, or reside in the same location as a new spouse or other family or friends,” and honor individuals’ decisions to move by not second-guessing the wisdom of the choices.<sup>300</sup>

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<sup>298</sup> Courts adjudicating custody disputes often see who is the “friendly parent,” i.e., the parent most likely to foster a loving relationship between the child and the other parent. See, e.g., OR. REV. STAT. § 107.137 (2006).

<sup>299</sup> This assumes that the child’s best interest is the sole criterion for deciding whether the move should be permitted. One could envision a partnership model that also takes account of each parent’s interests as well as the child’s best interests. Such a framework might yield a different outcome depending upon the equities of the particular case.

<sup>300</sup> *In re Marriage of Burgess*, 913 P.2d 473, 480-481 (Cal. 1996). In *Burgess*, the mother sought permanent custody, telling the court that she intended to move 40 miles away with the children because of a job transfer. The mother called the move “career advancing,” and claimed the schools, medical care, and extracurricular activities for the children were better in the new location. The father, unable to keep the visitation schedule if the mother moved, sought custody. The California Supreme Court held that “in an initial judicial custody determination based on the ‘best interest of minor children,’ a parent seeking to relocate does not bear a burden of establishing that the move is ‘necessary’ as a condition of custody. Similarly, after a judicial



In rendering its decision, the court rejected partnership ideology. The *Burgess* court described the parents in the case as needing to go their own ways, and suggested that it would be futile to try to get them to act in partnership: “[I]t is unrealistic to assume that divorced parents will permanently remain in the same location after dissolution or to exert pressure on them to do so.”<sup>301</sup> The court also rejected partnership ideology indirectly when it discussed the California Family Code’s policy favoring “frequent and continuous contact,” and “encourag[ing] parents to share the rights and responsibilities of child rearing.” The court concluded that such a policy did not constrain the trial court’s discretion to determine what arrangement was in the child’s best interest in a relocation contest.<sup>302</sup> It rejected the argument that the statutory language meant that the custodial parent had to prove relocation was necessary. The court stated that such an interpretation would abrogate the longstanding rule that “a parent having child custody is entitled to change residence unless the move is detrimental to the child.”<sup>303</sup>

*Burgess*’s orientation was consistent with, and perhaps inspired by, the view of Wallerstein, who had filed an amicus curiae brief. She believes that keeping parents in geographical proximity to each other is “fundamentally at odds with a divorce decision that necessarily determines that each parent will rebuild his or her life separate from the other.”<sup>304</sup>

While *Burgess* was an obvious victory for custodial parents, subsequent case law has curtailed the benefits of *Burgess*. The California Supreme Court in *In re Marriage of LaMusga*<sup>305</sup> interpreted *Burgess* so as to limit custodial parents’ ability to relocate by allowing a loss of frequent and continuing contact with a noncustodial parent to constitute detriment. The result in *LaMusga* might have been very different had partnership theory been emphasized and the noncustodial parent’s mobility considered.

The mother in *LaMusga* had primary physical custody. The mother

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custody order is in place, a custodial parent seeking to relocate bears no burden of establishing that it is ‘necessary’ to do so. Instead, he or she ‘has the right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child.’” *Id.* at 476.

<sup>301</sup> *Id.* at 480.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> Wallerstein & Tanke, *supra* note 40, at 314-15. Their article was adapted from her brief.

<sup>305</sup> 88 P.3d 81, 84-85 (Cal. 2004).

and father had joint legal custody, although they did not have a history of cooperative parenting. The mother sought to move with the children to Ohio; she had family there and, by the time of trial, her husband had already moved to Ohio to take a more lucrative job.<sup>306</sup> The children's father objected to their relocation, claiming that the mother "had attempted to alienate him from their sons since their separation and fear[ing] that moving the boys to Ohio would result in his 'being lost as their father.'"<sup>307</sup>

The trial court denied permission to move and awarded the father primary physical custody if the mother relocated. The distance between California and Ohio, and its impact on the father's relationship with the children, clearly concerned the court:

The primary importance, it seems to me at this point, is to be able to reinforce what is now a tenuous and somewhat detached relationship with the boys and their father. . . . I think the concerns about the relationship being lost if the children are relocated at this time are realistic. . . . Therefore, I think that a relocation of the children out of the State of California, the distance of 2000 miles . . . would inevitably under these circumstances be detrimental to their welfare. It would not promote frequent and continuing contact with the father, and I would deny the request to relocate the children.<sup>308</sup>

The court of appeal reversed the trial court's decision, citing *Burgess* and noting the mother's good faith reason to move.<sup>309</sup> The appellate court said the noncustodial parent could not prevent the custodial parent from moving unless the noncustodial parent made a "substantial showing" that the change of custody was "essential" to prevent detriment to the children.<sup>310</sup>

The California Supreme Court reversed the lower appellate court, thereby affirming the trial court's decision that the father should get primary physical custody if the mother relocated.<sup>311</sup> The noncustodial parent did not have to prove a change of custody was "essential" to prevent detriment; the noncustodial parent only bore the initial burden of showing that the proposed relocation would cause

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<sup>306</sup> *Id.* at 88.

<sup>307</sup> *Id.* at 86.

<sup>308</sup> *Id.* at 89.

<sup>309</sup> *Id.* at 84.

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

<sup>311</sup> *Id.*

detriment.<sup>312</sup> The likely impact of the move on the noncustodial parent-child relationship was relevant to establishing detriment. Once the noncustodial parent met his burden, the court “must perform the delicate and difficult task of determining whether a change in custody is in the best interests of the children.”<sup>313</sup> The California Supreme Court gave a list of factors that courts should consider when deciding whether to modify custody, but the list, like the rest of the opinion, omits any mention of the noncustodial parent’s ability to relocate.<sup>314</sup> In the case at bar, the father met his burden of showing detriment because the move was likely to harm the father-child relationship. Since the mother appeared unlikely to facilitate the long-distance

relationship, the California Supreme Court found that the trial court’s order was without fault.

Imagine how the result in *LaMusga* might have differed had the California Supreme Court said that parenting after divorce is a partnership and the noncustodial parent may have an obligation to relocate with the custodial parent and child if that arrangement would be in the child’s best interest. Assuming the California Supreme Court would have applied the same law as it enunciated in *LaMusga*, the outcome might have differed. Since the California Supreme Court placed the initial burden on the noncustodial parent to prove detriment, Mr. LaMusga would have to prove that he should not be expected to relocate. If he could not meet that burden, i.e., if he should relocate, then the mother and child’s relocation would not affect his relationship with his children. There would be no detriment, and therefore no changed circumstances to justify a change of custody.<sup>315</sup> If he could meet his burden, i.e., if he should not be expected to relocate, then the court would find a change of circumstance and determine if a change of custody were in the children’s best interest. This approach would have been consistent with *Burgess*’s emphasis on equality, but would have also permitted a more searching inquiry into whether relocation would have caused the children detriment.

The consideration of the noncustodial parent’s mobility flows naturally from a commitment to partnership ideology, and partnership ideology seems well-suited for relocation disputes. “Partnership”

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<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 85.

<sup>314</sup> *Id.* at 100.

<sup>315</sup> *Id.* at 97.

accurately describes post-divorce parenting, at least in the colloquial sense, if not necessarily in the legal sense. A child's care post-divorce typically involves the coordination of both parents' lives, even if the "partnership" is not acknowledged or fostered by the participants themselves. The custodial parent must accommodate the noncustodial parent's participation even if the noncustodial parent has a relatively minor role in caregiving. The noncustodial parent must do the same for the custodial parent. Post-divorce parenting also is a partnership because both adults influence who the child is and who the child will become.

Partnership ideology makes sense in the relocation context as a normative matter, especially if one believes the law has an "expressive role."<sup>316</sup> Professor Barbara Babb has explained, "Family law adjudication involves functions in addition to the social and private dispute resolution functions. Historically, family law has helped shape our conceptions of proper roles and values for interpersonal relationships."<sup>317</sup> Partnership should help foster a type of parental behavior that benefits children. As the Supreme Court of New Jersey stated: "*Ideally*, after a divorce parents cooperate and remain in close proximity to each other to provide access and succor to their children."<sup>318</sup> Partnership is a powerful concept that can help achieve more propinquity. In explaining the metaphor's descriptive and normative power,<sup>319</sup> Professor Cynthia Starnes states, "much of the

<sup>316</sup> Numerous social norms commentators have talked about law's expressive role. See, e.g., Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1603-04 (2000) ("In recent years, the social norms literature has shown that law can also have indirect effects on incentives. Thus, for example, a legal ban on smoking in public places or a 'pooper-scooper' law can motivate citizens not to smoke in certain areas or to clean up after their dogs even when the state has no resources invested in direct (or first order) enforcement. By empowering neighbors and other citizens to use public ridicule as an enforcement technique, these laws can influence behavior by imposing informal (or second order) sanctions, such as shaming. Similarly, these laws can have self-sanctioning (or third order) effects to the extent that citizens internalize the legal rule and are deterred by the prospect of guilt. These latter effects require that legal rules be mediated through social phenomena — social norms and human emotions — that are highly complex and only imperfectly understood."); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2043 (1996) (discussing importance of expressive function of law for moving social norms about gender equality).

<sup>317</sup> See Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 785 (1997).

<sup>318</sup> *Baures v. Lewis*, 770 A.2d 214, 217 (N.J. 2001) (emphasis added).

<sup>319</sup> Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513, 1534-36 (2005).

attraction of partnership . . . lies in its egalitarian principles of mutual contribution, reciprocal responsibility, and shared fate.”<sup>320</sup>

Presently, no data exists that documents the extent to which incorporating the noncustodial parent’s mobility into the analysis affects parties’ views. A study focusing on the effect in New Jersey, for example, would be useful. Absent such empirical evidence, anecdotal evidence alone supports my prediction about the positive effect this legal change might have on parties’ behavior. Kenneth Waldron, a psychologist with a practice devoted to divorce, explained in a recent article how parties’ views about the noncustodial parent’s mobility changed over time when he suggested this option during mediation:

The author was involved in mediating a relocation case in which the mother was offered a compelling career improvement, including about a 150% increase in income. Although the parties initially dismissed out of hand the possibility of the father moving, I convinced them that because they appeared to be at impasse and would no doubt be litigating the issue, spending some time really exploring the possibility that they would both relocate could do no harm. We spent a fair amount of time developing a vision of both relocating, what it would take for this to be a win-win solution, and what each would be willing to do to accomplish this vision. They resolved the dispute by developing a plan that included the mother paying for an apartment in the old location for the father so that he could return regularly to spend time with friends and continue to conduct his business. The father attained a residential placement schedule that he would not likely have achieved without agreement, the mother was allowed to take the position, knowing that the father was a great support system for the child while she pursued for [sic] her new busy career, and her out of pocket expense was insubstantial relative to her increased income. The children won because they had both parents in the same location, with neither parent regretting or resenting that fact.<sup>321</sup>

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<sup>320</sup> *Id.* at 1536. For her, the model illuminates the unfairness of the economic inequities experienced by primary custodians of minor children after divorce, and supports her argument that mothers should receive enhanced alimony awards upon divorce. *Id.* at 1543-44.

<sup>321</sup> Kenneth Waldron, *A Review of Social Science Research on Post Divorce*

Only time will tell if other social norms will inhibit noncustodial parents from accepting this vision of partnership and acting on it. After all, powerful social norms have been shown to frustrate men's expressed interest in spending more time with their children.<sup>322</sup> In the intact family, these expressed desires usually remain unfulfilled "because many families are too dependent upon men's wages for them to refuse to perform as ideal workers"<sup>323</sup> and "[s]uccess at work is so tied up with most men's sense of self that they feel little choice but to try to fulfill the ideal-worker role."<sup>324</sup> These same social norms may influence men's actions in the relocation context, although the dynamics of relocation may alter these obstacles sufficiently to permit cooperation. Asking a noncustodial father to relocate does not require him to forego working in order to spend more time with a child. Rather, relocation asks a man to change job locations in order to maintain the same amount of time with a child. Men can continue as "ideal workers," and fulfill an expressed desire to spend time with their children.

Some may worry that an emphasis on "partnership" will work to the detriment of custodial parents. This is a possibility if courts and policymakers emphasize partnership and ignore this Article's concomitant emphasis on equality and the child's best interest. These three theories operating together would not support any further doctrinal constraints on the custodial parent's mobility until equivalent restraints are imposed on the noncustodial parent's mobility. Instead, together these three ideas support a consideration of the noncustodial parent's mobility when the custodial parent seeks to relocate.

#### IV. MOVING FORWARD

With the theoretical justifications for the inquiry established, this section addresses some practical questions: Can relocation doctrine be reformulated to address the noncustodial parent's mobility? Exactly

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*Relocation*, 19 J. AM. ACAD. MATRIMONIAL LAW. 337, 347-48 (2005) (citation omitted).

<sup>322</sup> Professor Joan Williams explained that men's interest in spending time with their children, even at the expense of their careers or income, has risen over time. Williams reports, "More than half of men surveyed in a 1990 poll said they were willing to have their salaries cut by 25% to have more personal or family time." Williams, *supra* note 238, at 165 (citing MARY FRANCES BERRY, *THE POLITICS OF PARENTHOOD* 22 (1993)).

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

what would that inquiry look like under existing doctrine? What should be the repercussion for a noncustodial parent who refuses to move, although he should? How should a court address the noncustodial parent's mobility if the noncustodial parent is a danger to the custodial parent or child?

*A. Doctrinal Changes to Address the Noncustodial Parent's Mobility*

Since most judges have tremendous discretion under the existing standards, the incorporation of an additional fact into their analyses should not be threatening or even require new statutory authorization. Custodial parents can cite case law from those few jurisdictions that already make the noncustodial parent's mobility relevant.<sup>325</sup> Such sister-state authority has historically been persuasive in relocation cases.<sup>326</sup> In order to encourage the introduction of the noncustodial parent's mobility into the analysis, custodial parents can also cite statutory provisions about the importance of frequent and continuing contact between a child and his or her parents.<sup>327</sup> References to laws that reflect the jurisdiction's commitment to gender equality in the custody context would also be helpful.<sup>328</sup> Judges should be able to use relocation doctrine's elasticity to promote partnership and equality, just as they have used it over time to accommodate various policy concerns.<sup>329</sup>

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<sup>325</sup> See *supra* Part I.C.

<sup>326</sup> Elrod, *supra* note 13, at 14.

<sup>327</sup> See, e.g., ALA. CODE § 30-3-150 (2006); ARIZ. REV. STAT. ANN. § 25-408(A) (2006); COLO. REV. STAT. § 14-10-124(1) (2006).

<sup>328</sup> See, e.g., ARK. CODE ANN. § 9-13-101(a)(1)(A)(i) (2004 & West Supp. 2007) ("In an action for divorce, the award of custody of a child of the marriage shall be made without regard to the sex of a parent but solely in accordance with the welfare and best interest of the child."); DEL. CODE ANN. tit. 13, § 722(b) (2006) ("The Court shall not presume that a parent, because of his or her sex, is better qualified than the other parent to act as a joint or sole legal custodian for a child or as the child's primary residential parent"); ME. REV. STAT. ANN. tit. 19-A, § 1653(4) (1998 & Supp. 2006) ("The court may not apply a preference for one parent over the other in determining parental rights and responsibilities because of the parent's gender or the child's age or gender.").

<sup>329</sup> At one time, for example, courts exercised their discretion to support the maternal preference in custody disputes. During the period when the maternal preference was strong, courts were reluctant to deny mothers permission to relocate if the alternative was to transfer custody to the fathers. See, e.g., *White v. White*, 157 P.2d 415, 415-16 (Cal. Dist. Ct. App. 1945); *Epstein v. Epstein*, 207 N.W. 894, 894-95 (Mich. 1926). Courts also have exercised their discretion to protect their jurisdictional authority. During the period before 1968, when the Uniform Child

The noncustodial parent's mobility will be relevant to the relocation dispute in different ways in each jurisdiction. As mentioned earlier, jurisdictions typically have one of three approaches to relocation: a straight best-interest inquiry, a presumption for relocation, or a presumption against relocation. States that share the same approach sometimes allocate the burden of proof differently. The chart below attempts to illustrate how this Article's recommendation might be incorporated into some of the existing frameworks. The suggested changes are framed to be consistent with the states' various approaches, and, therefore, the suggested alterations are relatively minor in some cases. Jurisdictions committed to making the noncustodial parent's mobility even more central to the inquiry could reform the law further, for example by always allocating to the noncustodial parent the burden to prove that he or she cannot relocate.<sup>330</sup>

Test	Example	Potential Modification
Presumption in favor of relocation, rebuttable by the noncustodial parent showing that relocation would cause detriment to child.	<i>In re Burgess</i> <sup>331</sup> and <i>In re La Musga</i> <sup>332</sup>	When rebutting the presumption, the noncustodial parent must show that he should not also relocate before a court admits evidence about the potential harm to the noncustodial parent-child relationship from the relocation.

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Custody Jurisdiction Act ("UCCJA") was adopted by NCCUSL, some courts were skeptical of relocation for fear of losing jurisdiction over the dispute. *See* Baer v. Baer, 51 S.W.2d 873, 878 (Mo. Ct. App. 1932); Griffin v. Griffin, 187 P. 598, 600 (Or. 1920). Today the concern about losing jurisdiction emerges in cases involving international relocation because the UCCJA and the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") have taken care of interstate enforcement issues. Yet, when a court permits an international relocation, the court cannot be certain that the foreign nation will honor its custody and visitation order. As a result, courts sometimes deny international relocations for this reason, among others. *See, e.g.,* O'Shea v. Brennan, 387 N.Y.S.2d 212, 215 (N.Y. App. Div. 1976).

<sup>330</sup> Allocating the burden of proof to the noncustodial parent makes sense because he or she has greater access to the relevant information.

<sup>331</sup> 913 P.2d 473, 480 (Cal. 1996).

<sup>332</sup> 88 P.3d 81, 84-85 (Cal. 2004).



Best interest, with custodial parent showing relocation is in child's best interest.

*Tropea v. Tropea*<sup>333</sup>

Custodial parent may show, as part of best interest inquiry, that the noncustodial parent should also relocate.

Best interest, with noncustodial parent showing that relocation is not in the child's best interest.

*Ireland v. Ireland*<sup>334</sup>

Noncustodial parent may show, as part of best interest inquiry, that the noncustodial parent should not relocate too.

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<sup>333</sup> 665 N.E.2d 145, 150 (N.Y. 1996). *Tropea* did not address the burden of proof, but lower courts after *Tropea* made clear the burden of proof is on the custodial parent seeking to move. See, e.g., *Burnham v. Basta*, 659 N.Y.S.2d 945, 947-48 (N.Y. App. Div. 1997).

<sup>334</sup> 717 A.2d 676, 682 (Conn. 1998).

Test	Example	Potential Modification
Best interest, with neither party bearing the burden of proof.	<i>Ceisluk v. Ceisluk</i> <sup>335</sup>	Either parent may show, as part of best interest inquiry, that the noncustodial parent should or should not also relocate.
Presumption against relocation, rebuttable by custodial parent showing that relocation is in the child's best interest. Parent may need to show significant improvement in quality of life of child and parent.	<i>Maurer v. Maurer</i> <sup>336</sup>	Custodial parent can rebut presumption against relocation by showing it is in child's best interest to relocate, in part by proving the noncustodial parent should relocate too.
Relocation can result in modification of custody if relocation is a substantial change of circumstance and it is in the child's best interest to change custody.	Iowa Code § 598.21D (2006); <i>Green v. Green</i> <sup>337</sup>	A change in the noncustodial parent's relationship with the child will not be a significant change in circumstance unless the noncustodial parent can show that he should not also relocate.

### B. Practical Considerations

Evaluating the noncustodial parent's mobility requires evidence on two factually distinct issues: *can* the noncustodial parent relocate and *should* the noncustodial parent relocate. If the court determines that the noncustodial parent can and should move, the court would integrate those conclusions into its analysis. The effect would vary depending upon the doctrinal structure and the other facts in the case. A finding that the noncustodial parent can or cannot relocate is itself

<sup>335</sup> 113 P.3d 135, 137 (Colo. 2005).

<sup>336</sup> 758 A.2d 711, 714 (Pa. Super. Ct. 2000). In *Maurer*, the court felt the economic improvement of the mother was insufficient to justify the relocation because the father would suffer economic disadvantage from the increased distance involved. *Id.* at 715.

<sup>337</sup> 843 N.E.2d 23 (Ind. Ct. App. 2006).

not determinative of the custodial parent's request.

In assessing the noncustodial parent's mobility, a court must first determine the location that factors into its analysis. The "can" and "should" questions are answered in reference to that location. That place could be any spot that sufficiently mitigates the court's concerns about disruption to the parent-child relationship. It is not necessarily the location to which the custodial parent and children are moving. Imagine, for instance, the custodial parent wants to move forty miles away and that distance is enough to cause some serious interruption to the daily visitation already in place between the noncustodial parent and child.<sup>338</sup> While the noncustodial parent may not be able to move to the same area, the court should explore whether the noncustodial parent could move twenty miles closer to the child's new location. Then the midpoint for visitation transfers would be a mere ten miles each way.

Most cases will turn on the "should" and not the "can" question. A noncustodial parent almost always *can* relocate absent physical impossibility resulting from incarceration, immigration law, or essential medical services unavailable in the other location. Most objections to relocation relate to inconvenience, expense, and preference. These sorts of issues are relevant to, but not determinative of, whether that parent *should* be expected to relocate.

The "should" inquiry encompasses the practical difficulties of a relocation as well as other factors that bear upon the equities of a parallel move. This assessment involves examining the noncustodial parent's job opportunities in the new location,<sup>339</sup> the noncustodial parent's existing housing arrangement (e.g., does he rent or own), and the noncustodial parent's family members' ability to relocate too. Other relevant factors may include whether the noncustodial parent has ever lived in the area proposed for relocation, whether the noncustodial parent has ever planned to return to the proposed location,<sup>340</sup> whether the noncustodial parent speaks the language of

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<sup>338</sup> Carol Gersten, *Mediate the Move: Quelling Clients' Fears and Clarifying Options*, FAM. ADVOC., Spring 2006, at 30, 33.

<sup>339</sup> See, e.g., *In re Interest of C.R.O.*, 96 S.W.3d 442, 449 (Tex. App. 2002). This is similar to the information that courts already consider when custodial parents seek to relocate. See *Farnsworth v. Farnsworth*, 597 N.W.2d 592, 596-97 (Neb. 1999) (reporting that director of career services at Creighton University testified for party opposing relocation of mother about job opportunities in Omaha area for which mother was qualified).

<sup>340</sup> See, e.g., *Goldfarb v. Goldfarb*, 861 A.2d 340, 345 (Pa. Super. Ct. 2004) (father conceded that parties originally intended to return to Israel after he finished his

the place, whether the noncustodial parent has friends or family in either location, whether a *ne exeat* clause exists in a settlement agreement, whether the noncustodial parent would benefit from the move, and whether the noncustodial parent has already moved to a location in order to facilitate the custodial parent's choice. As mentioned previously,<sup>341</sup> the determination that the noncustodial parent "should not" be asked to relocate requires a court to *balance* the noncustodial parent's and the custodial parent's concerns about convenience and cost. Many of the factors that may make it difficult for a noncustodial parent to leave (e.g., job opportunities and language barriers), may also make it difficult for a custodial parent to remain. Other factors that may affect the equities of the situation from the noncustodial parent's standpoint may also affect the equities from the custodial parent's perspective (e.g., whether either parent has already moved to accommodate the other parent's choice). A court must decide whether on balance it is better for the child to relocate in light of the parents' respective hardships.

To illustrate the fact-specific and comparative nature of the inquiry, consider what impact the following fact should have on the analysis. Imagine that the noncustodial parent's income will be reduced if he relocates. Should this be a *per se* reason to say a move is not feasible? While courts should be concerned about the effect of income loss because it can impact child support, in some instances the loss may have no net effect on the child's well-being (for example, if the parent is and will remain a high-income obligor, or if the noncustodial parent's income loss will be offset by the custodial parent's income gain, or if the noncustodial parent's income loss is negligible). Even if the parents' combined income would fall when both relocate, this disadvantage still has to be weighed against any benefits the children would receive from the relocation.

The noncustodial parent's motives for not wanting to relocate should be examined as part of the analysis. Courts already examine the custodial parent's motives for wanting to relocate, exploring whether her decision is reasonable and made in good faith.<sup>342</sup> Equal

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residency in United States).

<sup>341</sup> See *supra* pp. 1773-74 (arguing that dicta in New Jersey cases — that noncustodial parent's mobility is only relevant in "unusual" cases — was really concern about feasibility of noncustodial parent's parallel move, and any answer must be compared to answer about feasibility of custodial parent staying put).

<sup>342</sup> See, e.g., *Lange v. Lange*, 717 N.E.2d 507, 513-14 (Ill. App. Ct. 1999); *Dixon v. Dixon*, 62 S.W.3d 589, 594-95 (Mo. Ct. App. 2001); *Leach v. Santiago*, 798 N.Y.S.2d 242, 244 (N.Y. App. Div. 2005). Arguably, the new inquiry might impact the analysis

treatment requires asking these same questions of the noncustodial parent. Asking these questions of the noncustodial parent is *not* the same as asking him why he opposes her move, a question commonly asked now. To that question, the noncustodial parent typically bases his opposition on the fear that his relationship with the children will suffer due to distance.<sup>343</sup> That response is clearly an inappropriate answer to the question why he opposes relocating himself.

Should a court restructure the noncustodial parent's visitation if it finds the noncustodial parent could and should move, the child relocates, and then the noncustodial parent refuses to follow? There are two possibilities: the court could restructure visitation to accommodate the parent's and child's geographic distance or it could leave the existing visitation order in place (or, if an order has yet to be entered, issue an order that necessitates geographical proximity). The latter provides the noncustodial parent with an incentive to relocate. It also makes more equal the treatment of the custodial and noncustodial parent in those jurisdictions that permit courts to threaten custody modification in order to keep the custodial parent in the area.<sup>344</sup> Nonetheless, if the noncustodial parent ultimately refuses to relocate, the noncustodial parent's visitation would essentially terminate without a restructuring of visitation, and this may be contrary to the child's best interest. Therefore, courts should probably walk a fine line when deciding a relocation dispute, e.g., giving strong incentives to noncustodial parents to relocate, but ultimately restructuring visitation when it appears that a particular child will be hurt because the noncustodial parent refuses to budge.

The noncustodial parent's actual plans regarding a parallel move should be assessed only after the relocation has been permitted, however. The noncustodial parent probably should not be asked whether he or she would in fact move if the relocation were ordered,

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of whether a custodial parent has bad faith motives for the relocation. To the extent that a move by the noncustodial parent is feasible, it might be difficult to conclude that the custodial parent is moving in order to interfere with the relationship between the noncustodial parent and child. On the other hand, past actions of the parties still may make it appropriate to draw a conclusion about the custodial parent's bad faith. See Peterson, *supra* note 12, § 52; Valdespino, *supra* note 39, at 22.

<sup>343</sup> See, e.g., Spire v. Adwell, 36 S.W.3d 28, 32-33 (Mo. Ct. App. 2000); Kalkowski v. Kalkowski, 607 N.W.2d 517, 522 (Neb. 2000); Tishmack v. Tishmack, 2000 ND 103, ¶¶ 6-18, 611 N.W.2d 204, 206-208; Thomas v. Thomas, 1999 PA Super. 249, ¶¶ 19-20, 739 A.2d 206, 212-13.

<sup>344</sup> Braver et al., *supra* note 48, at 208 (suggesting, however, that trend is away from such "strategic use of change-of-custody orders").

unless a comparable question is already posed to the custodial parent. The question should be avoided because any answer is highly problematic in terms of its meaning and utility. The AAML Model Act, which directs courts not to consider a custodial parent's declaration that he or she will not relocate if relocation of the child is denied,<sup>345</sup> describes the problem with this line of questioning:

The issue of propriety of the question of whether the person proposing to relocate the child will move regardless of whether the child is permitted to relocate has bedeviled litigation on this subject from the first time it was asked. A negative answer to the question, e.g., "No, I won't move," is likely to be prejudicial to the proposed relocation as to warrant exclusion from evidence despite the fact that logically that particular answer only tends to prove the proposition that the child is more important to the custodian than any other aspect of his or her life. It says nothing about whether a denial of the proposed relocation will cause the lives of the custodian and the child to be less advantageous. Similarly an affirmative answer, e.g., "Yes, I will move in any event," is also highly prejudicial to reaching a considered decision regarding the child's best interest. The psychology involved is very complex; allowing the question to be asked does not provide guidance as to how the possible answers are to be analyzed.<sup>346</sup>

A question posed to the noncustodial parent about his willingness to move is similarly unhelpful. It is difficult to know how to analyze a particular answer. An answer might reflect gamesmanship and even if it did not, it would not necessarily indicate what a parent would actually do if the court permitted relocation. In addition, the question does not advance the court's analysis of what is best from the child's perspective, i.e., whether the noncustodial parent *should* move.

Finally, courts should be cautious and not encourage noncustodial parents to follow the custodial parent and child when the noncustodial parent might harm the child or the custodial parent, such as in the case of domestic violence or child abuse.<sup>347</sup> Assuming visitation is still

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<sup>345</sup> AAML, *supra* note 1, § 406 (b).

<sup>346</sup> *Id.* § 406 n.18.

<sup>347</sup> Encouraging a parallel move by the noncustodial parent may similarly be inappropriate if the parents' relationship is characterized by high conflict. Children in high-conflict families show more emotional and behavioral trouble when courts order frequent contact by the noncustodial parent or joint custody over the objection of a

appropriate,<sup>348</sup> a court should use hortatory statements to discourage the relocation of such a noncustodial parent if distance will be best for the child and custodial parent. In this situation, the court should modify the existing visitation schedule so that the parties can live at a distance. Courts should be vigilant about using mechanisms like restraining orders, supervised visitation, and interstate judicial communication to assure the safety of the child and custodial parent after the visitation arrangement is modified. While some might think it best to avoid altogether an inquiry into the noncustodial parent's mobility in these situations, it is arguably better for the court to take a Janus-faced approach. After all, an inquiry into the noncustodial parent's mobility tends to make it *more* likely that a court would permit a custodial parent's relocation, a result presumably preferred in these sorts of situations.

#### V. THE IMPLICATIONS OF A RECONCEPTUALIZATION

This Article has already demonstrated how its reconceptualization would change existing relocation law.<sup>349</sup> Once one recognizes the importance of the noncustodial parent's mobility to the relocation analysis, one notices that the noncustodial parent's mobility is potentially relevant to a range of other laws that affect the custodial parent's mobility. This section argues that the noncustodial parent's mobility may impact constitutional analysis in the relocation context. It may also alter the application of laws aimed at deterring child abduction, such as the new Uniform Child Abduction Prevention Act and the federal International Parental Kidnapping Crime Act. Elevating the importance of the noncustodial parent's mobility may even prompt new legislative efforts to promote the voluntary relocation of the noncustodial parent with the child. Finally, this section focuses on the future drafting of the Uniform Relocation of Children Act and argues that this Article's reconceptualization should influence that Act.

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custodial parent. See Janet R. Johnson et al., *Ongoing Post-Divorce Conflict: Effects on Children of Joint Custody and Sole Physical Custody Families*, 59 AM. J. ORTHOPSYCHIATRY 576, 588-90 (1989).

<sup>348</sup> See MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 402 & cmt. (Nat'l Council of Juvenile & Family Court Judges 1994); AM. LAW INST., *supra* note 3, § 2.11.

<sup>349</sup> See *supra* Part I.A.

### A. Constitutional Considerations

Custodial parents occasionally claim that relocation restrictions infringe their constitutional right to travel,<sup>350</sup> a right articulated by the U.S. Supreme Court in *Shapiro v. Thompson*.<sup>351</sup> Professor Arthur LaFrance has noted how few courts actually address this argument.<sup>352</sup> When addressed, the argument is often unsuccessful. Courts frequently conclude that a custodial parent's right to travel is not unconstitutionally infringed when a court restricts the parent's ability to relocate with his or her child.<sup>353</sup>

Attention to the noncustodial parent's mobility may make the custodial parent's right to travel claim more viable, although the significance of the noncustodial parent's mobility will depend upon the court's orientation to the constitutional claim generally. Some courts reason, usually without any mention of the unconstitutional condition doctrine,<sup>354</sup> that a residency restriction only limits the ability

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<sup>350</sup> Ciesluk v. Ciesluk, 113 P.3d 135, 142 (Colo. 2005) (en banc); Jaramillo v. Jaramillo, 823 P.2d 299, 305 (N.M. 1991); Bates v. Tesar, 81 S.W.3d 411, 435, 437 (Tex. App. 2002); *In re Marriage of Sheley*, 895 P.2d 850, 852 (Wash. Ct. App. 1995) overruled by *In re Marriage of Littlefield*, 940 P.2d 1362 (Wash. 1997) (en banc); Watt v. Watt, 971 P.2d 608, 611 (Wyo. 1999).

<sup>351</sup> 394 U.S. 618, 629-31 (1969), overruled in part by *Edelman v. Jordon*, 415 U.S. 651 (1974) (disapproving of holding in *Shapiro* to extent that it held that Eleventh Amendment does not bar retroactive payment of benefits that were wrongfully withheld).

<sup>352</sup> Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 3 (1996).

<sup>353</sup> See, e.g., *Ziegler v. Ziegler*, 691 P.2d 773, 780-81 (Idaho Ct. App. 1985); *Clark v. Atkins*, 489 N.E.2d 90, 99-100 (Ind. Ct. App. 1986); *LaChapelle v. Mitten*, 607 N.W.2d 151, 163-65 (Minn. Ct. App. 2000); *Bates v. Tesar*, 81 S.W.3d 411, 438 (Tex. App. 2002); *Lenz v. Lenz*, 40 S.W.3d 111, 118 n.3 (Tex. App. 2000); *Lane v. Schenck*, 614 A.2d 786, 789 (Vt. 1992); *Momb v. Ragone*, 130 P.3d 406, 412-13 (Wash. Ct. App. 2006); cf. *Burch v. Burch*, 814 So. 2d 755, 759 (La. Ct. App. 2002) (holding that preliminary injunction restricting relocation by mother without permission of court "was not impinging on her constitutional right to travel, but rather was only subjecting it to the requirements for relocating a child subject to joint custody as set forth in [the statute]"); *Carter v. Schilb*, 877 S.W.2d 665, 668 (Mo. Ct. App. 1994) (holding that restriction on relocation did not unconstitutionally infringe custodian's freedom of personal choice in matters of marriage and family life). But see *In re Custody of D.M.G.*, 951 P.2d 1377, 1385 (Mont. 1998) (finding non-case specific evidence offered by noncustodial parent that children's best interests would be served if both parents resided in same state insufficient to demonstrate compelling state interest necessary to justify interference with custodial parent's right to travel by requiring her to relocate or lose primary custodial status).

<sup>354</sup> See Francis Amendola et al., 16A C.J.S. *Constitutional Law* § 644 (2006) ("There are some choices which the state cannot require a person to make, and a choice



of the custodian to relocate with the child, but not her ability to relocate without the child. As one court stated, “Her right to travel or even to establish residence elsewhere is limited only by her desire to retain her status as the custodial parent.”<sup>355</sup> Therefore, these courts conclude that the custodian’s right to travel is not infringed at all by relocation restrictions. For these courts, the noncustodial parent’s mobility will not change the constitutional analysis or outcome.

However, if a court recognizes that the custodian’s right to travel is limited by a relocation restriction (including a threat to change custody if the custodial parent relocates), then the noncustodial parent’s mobility should be relevant to the analysis. Courts that recognize the custodian’s right to travel tend to find it unhelpful to the custodian for one of two reasons: either the noncustodial parent has an equally weighty competing constitutional claim,<sup>356</sup> or a compelling state interest — such as detriment to the child or even the child’s best interest — justifies the restriction of the custodian’s movement.<sup>357</sup>

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between constitutional rights is one of them. . . . [Also, in] order to condition a grant of a discretionary benefit on the release of a constitutional right, the government must have an interest which outweighs the particular right at issue.”). *But see Jaramillo*, 823 P.2d at 306 (rejecting use of presumptions in resolution of relocation disputes, noting “[i]t makes no difference that the parent who wishes to relocate is not prohibited outright from doing so; a legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right altogether”).

<sup>355</sup> *Carlson v. Carlson*, 661 P.2d 833, 836 (Kan. Ct. App. 1983); *accord Clark*, 489 N.E.2d at 100; *Mason v. Coleman*, 850 N.E.2d 513, 521 (Mass. 2006); *Carter*, 877 S.W.2d at 668; *Lane*, 614 A.2d at 789; *Momb*, 130 P.3d at 408.

<sup>356</sup> *Accord LaChapelle*, 607 N.W.2d at 164 (discussing custodial parent’s right to relocate and citing, *inter alia*, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Meyer v. Nebraska*, 262 U.S. 390 (1923)); *Bates v. Tesar*, 81 S.W.3d 411, 436-37 (Tex. App. 2002) (rejecting that trial court’s order directing mother to return to county violated *Troxel v. Granville*); *see Ciesluk v. Ciesluk*, 113 P.3d 135, 142 (Colo. 2005) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745, 754 (1982); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (saying relocation cases pose “unique challenge . . . to promote the best interests of the child while affording protection equally between a majority time parent’s right to travel and a minority time parent’s right to parent”); *cf. Jaramillo*, 823 P.2d at 306 (recognizing father’s right and imposing on neither parent presumption that relocation is permissible or impermissible).

<sup>357</sup> *See, e.g., Ziegler v. Ziegler*, 691 P.2d 773, 780-81 (Idaho Ct. App. 1985); *Carlson*, 661 P.2d at 566; *Braun v. Headley*, 750 A.2d 624, 634-35 (Md. Ct. Spec. App. 2000); *Mason*, 850 N.E.2d at 521; *LaChapelle*, 607 N.W.2d at 164; *In re Custody of D.M.G.*, 951 P.2d at 1385; *Watt v. Watt*, 971 P.2d 608, 614-16 (Wyo. 1999); *see D’Onofrio v. D’Onofrio*, 365 A.2d 27, 30 n.1 (N.J. Super. Ct. Ch. Div. 1976)

Regardless of the reason for the argument's failure, courts that acknowledge the applicability of the right to travel argument may change their analyses, once they consider the noncustodial parent's potential mobility.

*Bates v. Tesar* helps illustrate why this is true. In *Bates*, the appellate court rejected the constitutional claim made by the mother, the sole managing conservator of the couple's two children, because the relocation would cause "detriment to the child," and preventing that detriment was a compelling state interest.<sup>358</sup> Although the mother had the exclusive right to set the children's primary residence, the father challenged the mother's ability to move the children to the Texas coast after her remarriage, some 362 miles from where the father lived.<sup>359</sup> The father sought a joint managing conservatorship and a domicile restriction to prohibit the mother from moving the children.<sup>360</sup> The trial court granted the father's request.<sup>361</sup>

The mother argued that a residency restriction violated her constitutional right to travel.<sup>362</sup> The appellate court recognized her right to travel. It emphasized that the right could not be impaired without "clear evidence" of a "substantial and material change of circumstance" and a proven "detrimental effect of the move upon the children."<sup>363</sup> Even after these factors were established, the court had to engage in a "balancing test," considering "the social, professional, economic and psychological advantages of the move to the parent desiring to relocate with the child."<sup>364</sup> The appellate court in *Bates* then affirmed the trial court, noting that the economic advantages of the move were "outweighed by the importance of the children having frequent and continuing contact with [the father]."<sup>365</sup>

In a case such as *Bates*, the ability of the noncustodial parent to relocate should affect the constitutional analysis and, in fact, an inquiry into the noncustodial parent's mobility seems constitutionally compelled. Detriment to the children from infrequent contact with

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(mentioning, without deciding, that mother's right to travel might be affected by relocation restriction, and mentioning inquiry would involve application of strict scrutiny); see also *LaChapelle*, 607 N.W.2d at 163.

<sup>358</sup> *Bates*, 81 S.W.3d at 438.

<sup>359</sup> *Id.* at 416 n.1.

<sup>360</sup> *Id.* at 416.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* at 435.

<sup>363</sup> *Id.* at 438 (quoting *Watt*, 971 P.2d at 615-16).

<sup>364</sup> *Id.* (citing *In re Marriage of Sheley*, 895 P.2d 850, 852 (Wash. Ct. App. 1995)).

<sup>365</sup> *Id.*

the father, as in *Bates*, would not exist if the noncustodial parent relocated with the family. A court should not find “detriment to the child” until it explores whether the noncustodial parent should move. Arguably, a court applying strict scrutiny should encourage the noncustodial parent to move as a less restrictive alternative to inhibiting the custodial parent’s mobility.

If, unlike *Bates*, the court’s analysis involves balancing the parents’ competing constitutional claims, the noncustodial parent’s mobility would again be relevant. A noncustodial parent might claim that the relocation impacts his right to the care and companionship of his child,<sup>366</sup> a right that exists regardless of the fact that the noncustodial parent’s relationship with his child is cemented by visitation and not custody.<sup>367</sup> Yet the strength of the noncustodial parent’s claim, and the extent to which a particular relocation infringes it, logically depends upon whether he might reasonably be expected to relocate in order to maintain the relationship. Various facts will influence the analysis, such as why the noncustodial parent objects to moving (physical impossibility versus preference) and the court’s insistence on making visitation contingent upon the noncustodial parent’s relocation (as opposed to restructuring the visitation after the relocation). The noncustodial parent may also claim the infringement of other rights, such as his own right to travel if he must move to reestablish visitation,<sup>368</sup> and these additional claims only heighten the

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<sup>366</sup> See *Ciesluk v. Ciesluk*, 113 P.3d 135, 142 (Colo. 2005) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745, 754 (1982); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (involving joint legal custodian).

<sup>367</sup> The U.S. Supreme Court has never concluded that the constitutional protection afforded to the parent-child relationship differs depending upon whether the parent is the custodial or noncustodial parent, even though it has distinguished between the parents for purposes of standing to raise constitutional issues on behalf of a child. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004). See generally *id.* at 16-17 (mentioning how right of noncustodial parent to communicate religious beliefs to child is protected by First Amendment); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 60 (1994) (“The parental right to care, control, and custody of children certainly underpins the non-custodial parent’s visitation rights. Thus, parents who refuse to support their children and even abusive parents retain their constitutional visitation rights, enforceable against the child’s will and regardless of the child’s ‘best interests.’”).

<sup>368</sup> The right to travel is apparently implicated when the government orders someone to travel against his or her wishes. One court defined the right to travel as the right “to live and settle down anywhere one chooses in this country without being disadvantaged because of that choice.” *LaChapelle v. Mitten*, 607 N.W.2d 151, 163 (Minn. Ct. App. 2000) (citing *Mitchell v. Steffen*, 504 N.W.2d 198, 201 (Minn.

difficulty the court will have reconciling the parties' respective positions. Time will tell how courts will manage the complexity, and

whether the child's best interest suffices to tip the scales in one direction or the other.

In short, attention to the noncustodial parent's mobility should affect the constitutional analysis in these cases. The ultimate outcome of these future contests is hard to predict now, but one thing is clear: the mobility of the noncustodial parent is central to the existence, resolution, and reconciliation of these competing interests.

### *B. Ramifications for Other Laws*

The law governing parental relocation is only one of several legal obstacles that impede the custodial parent's ability to move about freely in this world with her child. Other barriers to parental movement include laws that criminalize abduction, make interference with parental relations tortious, and permit severe penalties for civil contempt.<sup>369</sup> These encumbrances and others like them have emerged at all levels over the last fifty years. They are found in parties' custody orders,<sup>370</sup> state law (civil<sup>371</sup> and criminal<sup>372</sup>), federal law (civil<sup>373</sup> and

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1993)). The fact that a court is ordering a person to move, instead of prohibiting travel, has not been cited as a reason to reject custodial parents' right to travel arguments when they have had their custody conditioned on returning to a particular location. See *Carlson v. Carlson*, 661 P.2d 833, 836 (Kan. Ct. App. 1983); *LaChapelle*, 607 N.W.2d at 163; *In re Custody of D.M.G.*, 951 P.2d 1377, 1382-83 (Mont. 1998) (suggesting this fact pattern raises right to travel concerns "to an even greater extent"). There may be other rights at stake, too. See generally Patrick M. McFadden, *The Right to Stay*, 29 VAND. J. TRANSNAT'L L. 1 (1996) (discussing U.S. property law and takings doctrine as well as international law as bases for arguing against individuals' forced movement).

<sup>369</sup> In addition, some states now have statutory provisions that often impose a variety of penalties for interfering with another party's visitation, including a reduction of child support or loss of spousal support. See N.Y. DOM. REL. LAW § 241 (McKinney 2006); OR. REV. STAT. § 107.431 (2005).

<sup>370</sup> Gersten, *supra* note 338, at 33 ("It is increasingly common to negotiate restrictions and terms of the 'short distance relocation' in the initial parenting agreement.").

<sup>371</sup> Among other objectives, the authors of the Uniform Child Custody Jurisdiction Act sought to deter child abduction. See, e.g., *Gray v. Gray*, 12 S.W.3d 648, 650 (Ark. Ct. App. 2000).

<sup>372</sup> See, e.g., ALA. CODE § 13A-6-45 (2005); ALASKA STAT. § 11.41.320 (2006).

<sup>373</sup> International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 42 U.S.C. §§ 11601-10 (2006)) (implementing

criminal<sup>374</sup>), and international law.<sup>375</sup> Legal obstacles continue to develop, as the recent approval of the Uniform Child Abduction Prevention Act by NCCUSL indicates.<sup>376</sup>

As the noncustodial parent's mobility becomes more central to how courts and legislators think about relocation disputes, it may also become relevant to the application of these other laws. The spillover effect will be encouraged by the potential impact the noncustodial parent's mobility could have for the application of these other statutes, as this section demonstrates.

### 1. Uniform Child Abduction Prevention Act

The Uniform Child Abduction Prevention Act ("UCAPA") was adopted by NCCUSL in July 2006.<sup>377</sup> It expands upon laws that already exist in California, Texas, Arkansas, Florida, and Oregon.<sup>378</sup> The UCAPA provides a remedy to a parent who fears that the other parent will, or has, abducted his or her child. The UCAPA allows that parent to obtain a court order to stop the move (or to pick up the child if the move has already occurred). The notion of abduction is defined broadly. It encompasses the taking, keeping, or concealing of a child that "breaches rights of custody or visitation."<sup>379</sup> If the court "finds a credible risk of abduction of the child, the court shall enter an

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U.S. obligations under Hague Convention on Civil Aspects of International Child Abduction).

<sup>374</sup> International Parental Kidnapping Crime Act, 18 U.S.C. § 1204 (1997). The Amber Alert program also works to stop unauthorized moves if the police believe the victim is in imminent danger of serious injury or death. See generally 42 U.S.C. § 5791 (2006); Press Release, Dep't of Justice, Office of Justice Programs, AMBER Alert Plans in Place in All 50 States (Feb. 17, 2005), available at <http://www.ojp.usdoj.gov/newsroom/2005/OJJDP05008.htm>. In some states, most of the AMBER Alerts involve one of the child's parents as the abductor. See Bill Stewart, 2-State AMBER Alert Functions as Planned, THE OREGONIAN, Apr. 20, 2006, at B3.

<sup>375</sup> See generally Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, S. TREATY DOC. NO. 11, reprinted in 19 I.L.M. 1501 (1980) [hereinafter Hague Convention].

<sup>376</sup> UNIFORM CHILD ABDUCTION PREVENTION ACT (2006) [hereinafter UCAPA]; see also Press Release, NCCUSL, New Act Addresses the Problem of Child Abduction (Jul. 13, 2006), available at <http://www.nccusl.org/Update/DesktopModules/NewsDisplay.aspx?ItemID=162>.

<sup>377</sup> See *id.*

<sup>378</sup> See ARK. CODE ANN. §§ 9-13-401 to -407 (2006); CAL. FAM. CODE § 3048(b) (West 2006); FLA. STAT. ANN. § 61.45 (West 2006); OR. REV. STAT. ANN. § 109.035 (West 2005); TEX. FAM. CODE ANN. §§ 153.501-.503 (Vernon 2006).

<sup>379</sup> See UCAPA, *supra* note 376, §§ 2(1), 2(10), 2(11).

abduction prevention order.”<sup>380</sup>

If the noncustodial parent petitions for an abduction prevention order, the noncustodial parent’s mobility might influence the type of provisions a court would include in its abduction prevention order. The UCAPA contains no defenses to the entry of an order, but the Act recognizes that a court should balance various considerations in fashioning its remedy. Specifically, “the court shall consider the age of the child, the potential harm to the child from abduction, the legal and practical difficulties of returning the child to the jurisdiction if abducted, and the reasons for the potential abduction, including evidence of domestic violence or child abuse.”<sup>381</sup> The noncustodial parent’s mobility would be relevant to the “potential harm to the child from an abduction” if that harm were predicated on an interruption of the child’s relationship with the noncustodial parent. A court that believes the noncustodial parent can and should simply relocate instead of complain need not incorporate restrictive provisions into its order. The most restrictive provisions are discretionary.<sup>382</sup>

## 2. Criminal Provisions

A noncustodial parent’s mobility can also be relevant to a criminal prosecution of the custodial parent for child abduction. The International Parental Kidnapping Crime Act (“IPKCA”)<sup>383</sup> makes it illegal to remove or attempt to remove a child from the United States, or retain a child abroad, with the “intent to obstruct the lawful exercise of parental rights.”<sup>384</sup> Parental rights are defined to include visitation rights.<sup>385</sup> Therefore, even a parent with legal and physical custody might be prosecuted for this crime if the parent removes the child from the United States and intends to deprive the other parent of visitation rights.<sup>386</sup>

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<sup>380</sup> See *id.* § 8(b).

<sup>381</sup> See *id.*

<sup>382</sup> See *id.* § 8.

<sup>383</sup> 18 U.S.C. § 1204 (2007).

<sup>384</sup> *Id.* § 1204(a).

<sup>385</sup> *Id.* § 1204(b)(2).

<sup>386</sup> Cf. *In re Extradition of Schweidenback*, 3 F. Supp. 2d 118, 118 (D. Mass. 1998) (finding probable cause to extradite mother to Canada and that “dual criminality” requirement of extradition law was satisfied because federal law criminalized American mother’s act of removing children from Canada to United States, even though she had sole custody, and even though Rhode Island law would not criminalize her acts in this situation).

A custodial parent that reasonably assumes the noncustodial parent should follow her and the child to another location might lack the *mens rea* necessary for the crime. The custodial parent arguably would not have the intent to deprive the other of his parental rights in this situation.<sup>387</sup> The merit of this argument might depend upon how the visitation order was written. For example, it might be harder to suggest that *mens rea* were absent if the order specified that visitation must take place in a particular locale.

Making the noncustodial parent's mobility relevant to the IPKCA would align the IPKCA with the Hague Convention on the Civil Aspects of International Child Abduction. The Hague Convention's main remedy is an order returning an abducted child to his or her habitual residence. Yet the Hague Convention does not make this remedy available to a left-behind parent with only rights of access.<sup>388</sup> In this situation, the Hague Convention only obligates Central Authorities to assist the left-behind parent with securing visitation rights in the new locale, and the Convention does not label the custodial parent's action as "wrongful." The Hague Convention assumes, at least for purposes of visitation and any litigation over visitation, that the noncustodial parent should follow the custodial parent and child to the new locale. Consequently, a custodial parent familiar with the Hague Convention might reasonably believe that a noncustodial parent with only access rights should in fact follow her to the new locale to exercise visitation or to resolve any disputes over visitation. Before imposing criminal liability on the custodial parent for a removal that is not "wrongful" under the Hague Convention, it makes sense to examine whether the custodial parent believed that the noncustodial parent should in fact follow.

### 3. Incentives to Relocate

If the premise of this Article is accepted — that sometimes it is best for the custodial parent to relocate with the child and for the noncustodial parent to follow — then legislators should think about adopting laws that encourage this behavior in appropriate cases. Policy statements such as the following could be meaningful: "It is the

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<sup>387</sup> Such an argument may have benefited the defendant in the *Schweidenback* case, discussed *supra* note 386. The opinion did not contain the terms of the visitation order or discuss whether the father could also move to the United States.

<sup>388</sup> See Hague Convention arts. 3(a), 21, *supra* note 375, 19 I.L.M. at 1502, 19 I.L.M. at 1503.

policy of this State that the obligations of parenthood extend to parents in the post-divorce family and that noncustodial parents have an obligation to remain near their children, if feasible, when their children move.” Policymakers could also change parenting curricula to emphasize that this is an appropriate and preferred response when a custodial parent seeks to relocate with the child. Modifying the statutory standards governing relocation to make the noncustodial parent’s mobility an explicit factor in the analysis is also an obvious possibility.

Additionally, legislators could encourage the noncustodial parent to relocate with the child by providing appropriate incentives. The noncustodial parent might be awarded the costs of relocation if the custodial parent’s relocation request is granted, or a noncustodial parent might receive more visitation time if he willingly relocates. Legislators might enact a “relocation credit,” e.g., a tax credit that

recognizes the social value of keeping the post-divorce family in the same vicinity.<sup>389</sup>

### C. *NCCUSL’s New Uniform Relocation of Children Act*

Individual states can adopt this Article’s recommendations, but there is also the possibility of accelerating the reform process. The Program and Scope Committee of NCCUSL in July 2006 approved the drafting of a new model act on relocation. The Committee was convinced that a uniform approach among states is necessary in the relocation context. NCCUSL’s model act should explicitly address the noncustodial parent’s mobility as part of its effort to achieve uniformity. If the noncustodial parent’s mobility is made a major component of the model act, then countrywide legal reform may occur in a relatively short timeframe. Those readers who agree with the premise of this Article may want to urge the drafting committee to make the noncustodial parent’s mobility explicitly relevant to the determination of the custodial parent’s request to relocate.<sup>390</sup>

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<sup>389</sup> Some states already use public funds to help parents relocate when such relocation is in the public interest. See, e.g., FLA. STAT. ANN. § 445.021 (West 2006); N.Y. EXEC. LAW §§ 630, 631(2) (McKinney 2006 & Supp. 2007).

<sup>390</sup> The Honorable Debra H. Lehrmann is the Chair of the Drafting Committee on a Relocation of Children Act. Her address is Civil Courts Building, 200 E. Weatherford St., 4th Floor, Fort Worth, Texas 76196-0282. Her phone number is 817-884-2708.



## CONCLUSION

Courts adjudicating relocation cases are still struggling to harmonize two seemingly contradictory positions. Both have been articulated by Wallerstein. On the one hand, both parents are generally important to children's post-divorce lives. Twenty-five years ago, Wallerstein and Kelly wrote: "[T]he central hazard which divorce poses to the psychological health and development of children and adolescents is in the diminished or disrupted parenting which so often follows in the wake of the rupture and which can become consolidated within the postdivorce family."<sup>391</sup> Recognizing the importance of both parents to children's psychological well being, she suggested that "divorcing parents . . . be encouraged and helped to shape postdivorce arrangements which permit and foster continuity in the children's relations with both parents."<sup>392</sup> On the other hand, as also acknowledged by Wallerstein, a custodial parent's relocation can be important to the well-being of the child. Asking a custodial parent to forego "a new marriage, an important job opportunity, or a return to the help provided by an extended family . . . can be severely detrimental to the psychological and economic well-being of the parent over many years."<sup>393</sup> The impact on the parent "has the potential for burdening the parent-child relationship for many years, regardless of the choice the parent makes."<sup>394</sup>

This Article has provided a way to reconcile Wallerstein's observations: the law should encourage noncustodial parents to relocate with the custodial parent and the child. To date, most courts only consider solutions that involve either requiring the custodial parent to remain in the existing locale, thereby sacrificing the custodial parent's preference, or permitting the custodial parent to move and restructuring visitation, thereby potentially sacrificing the benefits of the existing visitation arrangement. The third option, that the noncustodial parent follows the custodial parent and child, is an important alternative that is rarely even considered.

Compelling justifications exist for the third option. This solution will be in some children's best interests. It reduces an otherwise irreconcilable conflict to a "win-win" situation for those children. It

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<sup>391</sup> WALLERSTEIN & KELLY, *supra* note 41, at 316.

<sup>392</sup> *Id.* at 311; Braver et al., *supra* note 48, at 216 (citing WALLERSTEIN & KELLY, *supra* note 41, at 311); Warshak, *supra* note 42, at 85 & n.11 (citing same).

<sup>393</sup> Wallerstein & Tanke, *supra* note 40, at 315.

<sup>394</sup> *Id.*

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also frees the law from its gendered assumptions about who must accommodate whom, and counteracts the gender bias that currently exists in the law. This solution treats post-divorce parenting as a partnership instead of mimicking the individualistic orientation of divorce law. It emphasizes that *both* parents must act in a way that furthers the best interest of their child.

Courts should have little difficulty incorporating the noncustodial parent's mobility into their analyses. The flexible doctrine will permit them to consider this factor. Case law from New Jersey, New York, and Texas, and statutory provisions from Louisiana, Florida, and Washington support the appropriateness of the inquiry. The inquiry itself poses no particular practical difficulties, although some policy questions are present such as whether visitation should be restructured when a recalcitrant noncustodial parent refuses to move, and how courts should approach the inquiry, if at all, when domestic violence or child abuse is present.

The noncustodial parent's mobility has the potential to become important to much more than the existing relocation doctrine. It may affect the constitutional analysis in these cases, strengthening the custodial parent's right to travel argument. It has the potential to have a dramatic impact on the application of the UCAPA and the enforcement of criminal provisions for child abduction. Recognizing that noncustodial parents at times should follow their children raises important questions about the appropriateness of preventing or punishing an "abduction" by the custodial parent in those instances. Policymakers persuaded by the Article's argument may even adopt measures to encourage voluntary relocations of noncustodial parents. Policy statements, parental education at divorce, and financial incentives are all possibilities in addition to doctrinal changes.

NCCUSL's proposed Uniform Relocation of Children Act provides an excellent opportunity for the noncustodial parent's mobility to become a relevant factor in every state. Perhaps within a short time lawyers around the country will be arguing that noncustodial parents should follow their children or will be proposing this option to their clients. Most optimistically, noncustodial parents may soon routinely and voluntarily follow their children as those children move, thereby showing their children the extent to which they love and cherish them and proving that the law's expressive role matters.