

A CHILDREN'S RIGHTS
APPROACH TO RELOCATION:
A MEANINGFUL BEST INTERESTS STANDARD

By

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In recent years, the issue of the standard to apply in relocation cases has been much discussed and much litigated. Yet, the family law community seems to be no closer to a consensus on how best to address this pervasive and vexatious issue. The problem arises when the relationship between parents and one or more children is set forth by a court decree of some type, and then one of the parents develops plans to move to a new location, thereby disrupting the previously court-ordered contact between the other parent and the child or children.

As any family court judge or family law attorney can attest, the number of these cases has skyrocketed in the recent years. Because of the competing interests at stake and the apparent inability to accommodate all of these interests, relocation cases present family courts and practitioners with arguably the most intractable disputes of the day. The prominence of the issue stems from a variety of factors, including the increasing numbers of working parents subject to employment-related transfer, the greater mobility of our society with far-flung families, and the rising numbers of custody disputes occurring within a burgeoning variety of family structures. Hence, not only are married couples divorcing and moving to different states for work and family related reasons, but we now have foster parents, step-parents, grandparents,

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and others who have significant relationships with children that are affected by relocations.¹ Indeed, the question of how to reconfigure the family system and maintain ongoing contact between important adults and the children in these relationships is one of the most pervasive and perplexing problems facing family courts across the country today.² The solutions thus far advanced have all met with controversy and dismay by some or all of the participants.

A review of the relocation literature suggests the difficulty of resolving this dilemma. For example, a number of articles have advocated and discussed the use of a presumption favoring the custodial parent who seeks to relocate. The thinking here is that the custodial home should be preserved to provide continuity for the child. While many judges and custodial parents like such presumptions, not surprisingly, non-custodial parents find this preference unacceptable.³ Other approaches have challenged any preference for the primary custodial parent, and instead have argued that greater weight should be given to ongoing contact between the child and the non-custodial parent, with the moving party bearing the heavier burden of proof; this approach favors the status quo over considering new opportunities or needs of the

¹ See, Gary A. Debele, Adoption Law and the Family: Facing the 21st Century, 54 Bench & Bar of Minnesota 37 (Dec. 1997).

²There is currently a lively debate among American Sociologists as to how children are being affected by the significant changes in the American family that have occurred in the past 50 years. See, e.g., Sharon K. Houseknecht and Jaya Sastry, Family “Decline” and Child Well-Being, 58 J. of Marriage and the Family 726 (August 1996). Reduced to its most basic elements, the debate is really about whether children function best in a traditional family consisting of a married man and woman or whether other configurations of the family – such as single parents, unmarried parents living together, divorced parents with or without step-parents, and gay and lesbian individuals and couples – can also provide an environment suitable for the raising of children who may or may not be the biological offspring of the parent figures. One group claims statistics and studies show that children raised in traditional husband-wife families are the most well-adjusted, do best in school, avoid teen pregnancy, violence, and mental illness. See, e.g., Barbara Defoe Whitehead, Dan Quale was Right, The Atlantic Monthly 47-84 (April 1993); David Blankenhorn, Fatherless America: Confronting Our Most Urgent Social Problem (1995); David Popenoe, A World Without Fathers, Wilson Quarterly 12-29 (Spring 1996). The other side argues that it is the individual parenting and nurturing that occurs in any family rather than the actual structure and marital status of its members that is critical. See, e.g., Judith Stacey, Brave New Families: Stories of Domestic Upheaval in Twentieth-Century America (1994); Judith Stacey, The New Family Values Crusaders, The Nation 119-22 (July 25 – August 1, 1994); James Garbaring A Vision of Family Policy for the 21st Century, 52 J. of Social Issues 197 (1996).

³ See, e.g., Carol S. Bruch & Janet M. Bowermaster, The Relocation of Children and Custodial Parents: Public Policy, Past and Present, 30 Fam. L. Q. 245 (1996)

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custodial parent.⁴ Another suggested approach simply avoids any discussion of a preference for either the custodial or the non-custodial parent and focuses instead on a list of so-called “best interest” factors and other relevant considerations that a court should take into account on a case-by-case approach. This appears to be the most neutral approach, but it is criticized as requiring painful, time-consuming, and expensive trials with any proposed relocation.⁵

To compound this lack of consensus of how to resolve these disputes, other issues are also present. For example, none of these approaches adequately addresses those difficult cases where the parties share joint physical custody - - a custodial configuration that appears to be increasingly more common. Furthermore, these disputes raise important constitutional rights of the parties involved, particularly the moving parents’ constitutional right to travel.⁶ Any approach that would be a blanket prohibition on relocation would run into such constitutional concerns. A survey of how family courts have addressed this issue reveals the plethora of approaches taken by courts and legislatures across the country in addressing this difficult issue.⁷

⁴ See, e.g., Richard M. Bryan, Beyond Burgess: One Year Later, Fam. Advocate, 14 – 17 (Fall 1997); Frank G. Adams, Child Custody and Parental Relocations: Loving Your Children from a Distance, 33 Duquesne L. Rev. 143 (1994); Merril Sobie, Whatever Happened to the “Best Interests” Analysis in New York Relocation Cases? A Response, 15 Pace L. Rev. 685 (1995); Cheryl S. Karner, Relocation: What Ought To Be, Fam. Advocate, 12 – 14 (Fall 1997)

⁵ See, e.g., Kimberly K. Holtz, Move-Away Custody Disputes: The Implications of a Case by Case Analysis and the Need for Legislation, 35 Santa Clara L. Rev. 319 (1994); Norma Levine Trusch, A Panoramic View of Relocation: Where Have We Been? Where Are We Going? Fam. Advocate, (Fall 1997); See also, The American Academy of Matrimonial Lawyers’ Proposed Model Relocation Act. In this Act, the Academy lists eight factors that Courts should consider in determining whether to permit relocation. As evidence of the controversial nature of this dispute and the complete lack of consensus, rather than advocating a specific burden of proof, the proposed Act submits three alternatives, leaving state legislators to determine the direction that is dictated by local public policy. These alternatives include the following: (1) the relocating person bears the burden of proving that the relocation is made in good faith and is in the best interests of the child, or (2) the non-relocating person bears the burden of proving that the objection is made in good faith and the relocation is not in the best interests of the child; or (3) the relocating person initially has the burden of proving that the proposed relocation is made in good faith, and, if that burden is met, the burden shifts to the non-relocating person to show that the proposed relocation is not in the best interests of the child.

⁶ See, e.g., Edward Sivin, Residence Restrictions on Custodial Parents: Implications for the Right to Travel, 12 Rutgers L. J. 341 (1981).

⁷For such an overview, see Nancy Zalusky Berg & Gary A. Debele, Post Decree Custody Modification: Moving Out of State and Changes to the Parenting Relationship, 10 Am. J. of Fam. L. 183 (Winter 1996).

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These analyses by scholars and practitioners and the varied approaches taken by courts and legislatures have not brought us any closer to a more satisfactory approach to relocation disputes. Given that relocation issues are occurring more frequently and in a greater variety of family configurations, it is indeed time to move towards a more satisfactory way to address relocation disputes, regardless of the context. Indeed, the common thread that emerges in all of the analyses thus far applied to relocation cases is the underlying belief that the ultimate decision must be made in the best interests of the child. Yet, the concept of “best interests of the child” is an amorphous concept that has been very difficult for courts, litigants, children’s advocates, and mental health professionals to flesh out and apply. The time has now come for participants in all relocation cases to analyze these issues with the best interests of the children truly in mind and to come up with an approach that will ultimately protect the interests of the child, regardless of the type of family arrangement in which the child resides and in which the relocation dispute arises.

The ultimate conclusion that is reached in this article is that if we indeed are to protect the best interests of the child in any relocation disputes, the child must be recognized as an individual with legal interests separate from the parents and any other adults involved in the dispute. These often unique interests of the child must be elevated to the paramount consideration in these matters. This will require that in any relocation case, a sophisticated and appropriately trained guardian ad litem must be appointed to independently and objectively analyze the interests of the child - - including, for example, psychological interests, emotional interests, and educational interests - - and how these interests will be impacted in a move. This also will require the appointment of an attorney trained in family matters and one with experience representing children to act as an advocate for the child’s interests in the relocation case.

While such an approach certainly will be controversial and will often be rejected out of hand simply because there are inadequate resources to allow for such an approach, it should be taken seriously. If we truly value the best interests of the child as the centerpiece of all family disputes, then we must begin to back such approaches with appropriate resources and procedures. Such an approach not only would enhance the actual consideration of the child's interest in these cases, it would require a dramatic reorienting of the legal culture in which we decide these relocation cases as well as all other family disputes that find their way into the judicial system.

The analysis of this issue will begin with a review of the historical and cultural milieu in which American relocation disputes take place, with discussion focused on the historically evolving nature of custody doctrine and notions of childhood, and the uniquely American culture emphasizing individualism, individual rights, fear of state encroachment in family matters, and the use of litigation to resolve family disputes. The children's rights movement both in its historical manifestations and its current status will then be discussed. That is followed by a discussion of legal representation of children and a proposal for children's individual standing in relocation cases, using the Gregory K. case coming out of Florida as a precedent for this controversial suggestion. An overview and analysis of the contest between parental rights and children's rights is then provided. Because the significance of psychological issues is critical in relocation disputes, the new research and theories of Judith Wallerstein and Tony Tanke are discussed and presented in significant detail. A model for addressing relocation disputes is then presented using the basic components of a termination of parental rights proceeding. Finally, practical concerns with this proposed approach are then discussed.

I. The History of Custody, the History of Childhood, and Uniquely American Notions of Individual Rights.

It is impossible to consider a children's rights approach to relocation disputes without adequately acknowledging the unique American legal and cultural setting in which relocation and other custody disputes arise. The United States, more than any other country in the world, is founded upon deeply held notions of the individual rights of its citizens, the protection of such legal rights within an adversarial legal system, and the prevalent use of litigation to protect such rights.⁸ The importance of this individual rights-based culture and its pervasive notions of individual autonomy cannot be overstated. Indeed relocation disputes, like other legal disputes involving children, bring a set of conflicting individual legal interests together: the rights of two or more adults to ongoing contact with the child, the rights of a child to either have or not have this contact, and the pervasive involvement of the state in its role as parens patriae and ultimate protector of the child's best interests. The lack of consensus in American society of how to balance these individual interests, compounded by our culture of individual autonomy, general suspicion of "state" involvement in family matters, and a pervasive litigiousness in our society all come together to make these relocation disputes nearly unresolvable.

The legal treatment of custody and the very notions of "childhood" have evolved over the years.⁹ This history is important when considering solutions to the current relocation crisis.

⁸ See generally, Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (1974).

⁹ For general discussions of the historical treatment of custody disputes, see Mary Ann Mason, *From Father's Property to Children's Rights: A History of Child Custody in the United States* (1994); Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth Century America* (1985); Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society* (1988); Lawrence Stone, *Road to Divorce: A History of the Making and Breaking of Marriage in England, 1530 – 1987* (1990). For a general discussion of the history of childhood and the family, see John Demos, *Past, Present, and Personal: the Family and the Life Course in American History* (1986); Philip Aries, *Centuries of Childhood: A Social History of Family Life* (translated from the French by Robert Baldick, 1962); Joseph F. Kett, *Rites of Passage: Adolescence in America, 1790 to Present* (1977); Viviana A. Zelizer, *Pricing the Priceless Child: the Changing Social Value of Children* (1985).

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During the colonial period, children were viewed first and foremost as important economic producers; they were generally considered property “owned” by their fathers or their guardians. When colonial courts became involved in the placement of a child, it was usually when they were asked to enforce contracts for indentures or to resolve conflicts regarding child labor. Notions of having custody so as to provide the child with love, nurture, and emotional attachment were many decades away. During the colonial era, fathers had paramount rights to the custody and control of the children in their household. Colonial mothers had no legal right to their children when the husband/father was alive, and only restricted rights upon his death. During this period, divorce was an unusual event.¹⁰

From approximately 1790 to 1890, there was a dramatic shift away from the father’s common law rights to custody and control of their children toward a more modern emphasis on the need to nurture, care for, and love the child. Indeed, the notion of “best interests” of the child first emerged during this period. During this period of time, slavery was abolished and indentured servitude for children was increasingly frowned upon. The changing status of women, including their acquisition of greater property rights and the elevation of their position within the family as primary nurturer of the child, led to the emergence of the “tender years doctrine” that favored placing children in the care and custody of their mothers.¹¹

At the end of the nineteenth and in the early years of the twentieth century, in a period known as the “Progressive Era,” the state assumed a decisively more active role in regulating the care, custody, and control of children across the country. Legislation was enacted that insisted upon compulsory education and strict controls on child labor, the first juvenile courts were created, and new standards emerged to evaluate parental competence and prevent child abuse

¹⁰ Supra note 9, at xvii.

and neglect.¹² If parents violated these laws, they risked losing custody of their children.¹³ It was during this time that the state, for the first time, considered aiding poor but “worthy” mothers, rather than simply removing their children when they were unable to support them.¹⁴ All of these developments in the “Progressive Era” led to the creation of the modern child welfare system. The mid-nineteenth century trend of preference for mothers having custody of their children following divorce became nearly universally established in case law and was ratified by many state legislatures.¹⁵

While states during the Progressive Era were increasing their involvement in the regulation and intervention in families, the importance of individual family and parental autonomy was being reaffirmed at the national level. It was during the 1920’s that the United States Supreme Court began to apply the United States Constitution to family autonomy matters. In Meyer v. Nebraska,¹⁶ the Supreme Court included within its definition of liberty interests receiving constitutional protection the right to marry, establish a home, and bring up children as the individual parent saw fit. In Pierce v. Society of Sisters,¹⁷ the Supreme Court reaffirmed the fundamental and constitutionally protected interest held by parents and guardians to direct the upbringing and education of children under their control. In Prince v. Massachusetts,¹⁸ the Supreme Court said that it was cardinal that the custody, care, and nurture of the child -- which the state can neither supply nor hinder -- resides first with the parents.

¹¹ Id.

¹² Id. at 86-87

¹³ Id. at 100-108

¹⁴ Id. at 92-100

¹⁵ Id. at xviii.

¹⁶ 262 U.S. 390 (1923).

¹⁷ 268 U.S. 510 (1925).

¹⁸ 321 U.S. 158 (1944).

As the twentieth century wore on, these views of parental autonomy were tempered in a variety of ways. The state began to take a more active role in monitoring standards of parental conduct, frequently intervening to take temporary or permanent custody of the child. The United States Supreme Court acknowledged in Wisconsin v. Yoder¹⁹ that the power of parents may be subject to limitation if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. Yet, other contemporary cases continued to uphold strict limitations on the state's ability to intervene in family affairs.²⁰ Even in cases where there was harm or neglect of a child, the United States Supreme Court determined that the Constitution calls for a balance to be struck by requiring states in cases of child neglect to prove by the heightened clear and convincing evidence standard the need for the termination of parental rights.²¹

Beginning in the 1970's dramatic changes in custody law sharply reversed what had been a long-entrenched preference for mothers in custody disputes.²² Most states adopted laws conferring an equal status on the custodial rights of mother and father with a favorable attitude towards joint custody.²³ Furthermore, biological parents were gaining rights over growing numbers of non-biological parents, particularly stepparents and foster parents who were, in fact, often raising children when traditional and biological families broke down.²⁴ The state took a

¹⁹ 406 U.S. 205 (1972).

²⁰ See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968) (constitutional interpretation has consistently recognized that the parent's claim to authority in their own household to direct the rearing of their children is basic in the structure of society.); Stanley v. Illinois, 405 U.S. 645 (1972) (the right to conceive and raise one's children have been deemed essential, basic civil rights of man, and rights far more precious than property rights.); Wisconsin v. Yoder, 406 U.S. 205 (1972) (the court invalidated a Wisconsin law that compelled Amish children to attend school, ruling that the strong state interest in the compulsory schooling of children must fail when balanced against the rights of parents to direct the religious upbringing of their children.)

²¹ See, Santosky v. Kramer, 455 U.S. 745 (1982).

²² Mason, supra note 9, at 123-129

²³ Mason, supra note 9, at 129-132 California led the way in custody initiatives, as it had in no-fault divorce, by introducing a preference for joint custody in 1980. By 1988, 36 states had followed its lead.

²⁴ Mason, supra note 9, 133-139

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more active role in monitoring standards of parental conduct, frequently intervening to take temporary and permanent custody.²⁵ The state also began supporting an ever growing population of single parents, allowing them to maintain custody of their children.²⁶ New reproductive technology, separating conception and childbearing, challenged the ingenuity of lawmakers and courts.²⁷ As part of these modern developments, there has been an increased reliance in custody disputes on social and behavioral scientists to provide guidelines for what constitutes the “best interests” of the child. Increasingly, expert witnesses have been called upon to evaluate the relationship between the parent and the child.²⁸ Into this shift away from a father’s preference, to a mother’s preference, to a multi-faceted, social scientific best interest standard for custody decisions with a new emphasis on joint custody has been thrust the relocation dispute. Individual judicial officers with personal predilections and all of this historical baggage of custody law are asked to resolve these disputes.

As with the history of custody in American culture, a brief consideration of the history of childhood also illuminates further the complex nature of the issues involved in relocation disputes. In his discussion of the history of childhood in America, Joseph Kett traces changes occurring during the tumultuous eighteenth and nineteenth centuries.²⁹ During the colonial era and early years of the nation, there was little demarcation between childhood and adulthood. Early in their lives, children began working and extended formal education was unusual. This trend continued as young people were increasingly uprooted from agriculture and moved to urban areas where they worked in factories. Accompanying this development was more variety in the types of labor young people did, as well as a trend toward increasing disorderliness and

²⁵ Mason, supra note 9, at 149-156

²⁶ Mason, supra note 9, at 144-149

²⁷ Mason, supra note 9, at xviii

even violence in youth oriented educational and social institutions. While the dependency of childhood was of shorter duration than in modern times, semi-dependency lasted longer. Youth were generally seen as reckless and few institutions then existed which marked passage from childhood to adulthood.³⁰ This limited notion of childhood supported a law of custody favoring fathers rights to the labors of their children.

While the environment of young people prior to 1840 was likely to have been casual and unstructured, it became increasingly patterned and regulated as the century wore on. The changes began with an increase in the number of public schools with their emphasis on supervision, training, order and formation of character. Evangelical protestants were especially active in the growing institutional and intellectual concerns with the welfare of young people. Also important were the changes occurring in the social position of women, rendering the feminine influence more pervasive and important in the nurturing of children. An increasingly widespread romantic notion developed that the period of childhood was a time fraught with peril and danger requiring increasing parental and societal control. By the last decades of the nineteenth century, industrialization required more schooling if children were to advance economically. Declining birth rates created a kind of family in which self-conscious nurture rather than remote government of children was possible and indeed vital to the industrial society. Middle class values of self-restraint and self-denial thus were asserted in an extreme form, and conscious efforts were made by parents, clergy, educators, and social workers to enforce the

²⁸ Mason, *supra* note 9, at 167-178

²⁹ Joseph F. Kett, *Adolescence in America 1790 to the Present* (1977).

³⁰ Id. at 5 - 6, 11 - 85.

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obedience and dependency of children.³¹ This, of course, led to the rise of the “tender years” doctrine discussed above which favored mothers when custody disputes arose.

During the Progressive Era children came to be seen not only as the victims of American society, but also as its saviors. Salvation from current social problems seemed to lie in the innocence of children and their amenability to education. Social order and national greatness were thought to depend on their care and protection, a concept unheard of in earlier centuries. During this critical period of history from 1880 to 1920, these dramatic changes occurring in the American family and in the concept of childhood impacted developments in family law. While the notion of a period of childhood innocence first took root in the Enlightenment in Europe in the seventeenth century, it reached its peak in the United States at the beginning of the twentieth century. Child labor laws, universal education, and the juvenile justice system all emphasized as never before the ways children differed from adults, thereby requiring necessary differences in treatment.³²

According to noted social critic Neil Postman, the period between 1850 and 1950 represented the high water mark of the concept of the child.³³ In America, successful attempts were made during these years to get all children into school and out of factories, into their own clothing, their own furniture, their own literature, their own games, their own social world. In hundreds of laws, children were classified as “qualitatively different from adults;” in hundreds of customs they were assigned a preferred status and offered protection from the vagaries of adult life. This was the period during which the stereotype of the modern family was cast, and it was the period in which the parents were expected to develop a full measure of empathy, tenderness,

³¹ *Id.* at 111 – 187. See also, Viviana A. Zelizer, Pricing the Priceless Child: the Changing Social Value of Children (1985).

³² Kett, supra note 29, at 111-187.

and responsibility toward their children. By the turn of the century, childhood had come to be regarded as every person's birthright and an ideal that transcended social and economic class.³⁴ These notions of childhood continue to be clung to by participants in the relocation disputes and by children's advocates.

Postman explains in his study of the disappearance of childhood how a new and revolutionary media has caused the expulsion of childhood from its venerated position as discussed above. This is evidenced in the merging of tastes and styles of children and adults, as well as the changing perspectives of relevant social institutions such as the law, the schools, and sports. Additional evidence of this disappearance of childhood is found in the earlier onset of alcoholism, drug use, sexual activity, and serious crime, all of which, according to Postman, implies a fading distinction between childhood and adulthood.³⁵ Further examples abound. States around the country are dismantling the juvenile justice system at a furious clip. In education, the school is now viewed as a workplace: recess has been eliminated; school children everywhere are tested like laboratory rats; the education debate is relentlessly framed in terms of international competition and training future workers; and the high stakes race for college admission is now preceded by the high stakes race for preschool admission. Up until the 1960's media images paid homage to the notion of childhood innocence. This has given way to increasingly sexualized images of ever younger childlike models and ads for various products. In some ways this blurring between childhood and adult has become inevitable, a function of changes in biology, communications and society. Because of better nutrition and health care, children grow up faster. As they grow up physically faster, children are exposed to the world at

³³ Neil Postman, *The Disappearance of Childhood* 67 (1994). For further discussion of Postman's theories, see Peter Applebone, No Room for Children in a World of Little Adults, *New York Times*, May 10, 1998, Section 4.

³⁴ Postman, *supra* note 33, at 67.

an ever accelerated pace. Also, as women have increasingly left the home for work, the gatekeeper of the separation between adulthood and childhood is increasingly unavailable to play that role.³⁶ This disappearance of romantic notions of childhood and children, when coupled with a view of custody decisions based on social scientific best interests criteria without a preference for either the mother or father (or even a biological parent) supports a notion of children as separately protected participants with their own interests and rights in a relocation or any other custody dispute.

Not only does the historical evolution of the treatment of custody disputes in American history and the changing view of childhood and best interests criteria affect the relocation dispute, but furthermore, one cannot ignore the uniquely American emphasis on individual rights that each American citizen deems to be his or her birth rights in any dispute into which he or she is thrust. As one of the central thesis of the article is that children also have such individual rights that must be elevated and protected in custody and relocation disputes, at least a passing discussion of this uniquely American notion of individual rights is necessary to fully comprehend and ultimately accept the approach toward relocation disputes that is being advocated in this article.

There has long been a tradition of American beliefs accepted as mainstream, taught in our schools, and advanced throughout society emphasizing individualism, private property, the market economy, and limited government. While there may be differences between the major political parties in this country as to how these values are emphasized and used in society, there does tend to be a wide spread belief that private property, in whatever form, is identified as the secret of individual achievement and satisfaction, the individual with a stake in the existing

³⁵ *Id.* at 120

system is the cornerstone of stable government, that there is a wide spread distrust of the power of the state, and that the purpose of politics is to serve needs defined from a personal prospective. In short, there is a wide spread and fundamental notion at work through all classes and regions of the country that the integrity of the individual is embodied in the idea of equality before the law and protected against governmental intrusion in a variety of ways spelled out in provisions of the Bill of Rights. The perception is pervasive that individual rights in American culture are asserted, and indeed protected, in our burgeoning judicial system. Americans talk freely, openly and frequently about their rights regardless of the nature or level of the dispute. Family law disputes, like any other, are played out in our culture as a battle of competing rights which, if they cannot be worked out between the parties by themselves without judicial or other state involvement, end up in the judicial system for resolution.³⁷

Despite this extreme American focus on individual rights and liberties and the frequent use of litigation to protect such rights and interests, there has also been a historical reluctance to extend these rights to certain less powerful segments of society. This has included blacks, women, and of course, children. As an example of this cultural refusal to recognize children's rights, a recent article addressing probate and inheritance issues notes that the United States, nearly alone among modern nations, allows parents to disinherit their children.³⁸ Although the author, Ronald Chester, acknowledges a number of reasons for this situation, he believes an explanation of this phenomena most likely lies in the American culture's extreme tolerance for

³⁶ Id.

³⁷ Scheingold, supra, note 8, at 18-20. For an observation by an outsider of America's unique fixation on rights and litigation, see Alexis de Tocqueville, *Democracy in America* (1959). For classic historical studies of these uniquely American characteristics, see Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (1955); Richard Hofstadter, *The American Political Tradition and the Men Who Made It* (1955).

³⁸ Ronald Chester, Should American Children be Protected Against Disinheritance? 32 *Real Property, Probate & Trust J.*, 405, 406 (Fall 1997).

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individual control over property, even after death. Clearly, these entrenched notions of individualism and rights are important concepts given our nation's early approach to custody and childhood.

While no one outwardly considers children to be property anymore, neither children nor the family appears to be held in high enough esteem to overcome this cultural desire for individual control.³⁹ Chester also notes that Americans exhibit a strain of individualism that often takes on an anti-government slant. In short, many Americans would not want an organ of the state, including a court, to have broad discretion over the disposition of their property.⁴⁰ The same notions exist in family related matters. As a result, widespread American belief in parental autonomy for themselves and their children make family protection more difficult to realize in the United States.⁴¹ This is certainly true in family court disputes where courts must decide for disputing parents where a child must be placed and then whether to subsequently allow a parent to relocate with the child.

II. The Children's Rights Movement.

While approaches to custody and the concept of childhood have changed over time, and as notions of individual (i.e. parental) rights and individual autonomy continue to be central to our culture, the children's rights movement has emerged. A review of the history of this movement is helpful to this analysis of a children's rights approach to relocation disputes. According to law professor Martha Minow, in the 1970's many lawyers, scholars, and activists began a "children's liberation" movement and argued that questions of children's competence should be decided on a case-by-case basis and that children deserved rights to participate fully in

³⁹ *Id.* at 406, 407.

⁴⁰ *Id.* at 413.

⁴¹ *Id.* at 435 - 436.

society.⁴² Another group of lawyers, scholars, and activists argued at the same time that instead of simply liberating young persons from the constraints of childhood status, the emphasis should be upon providing protections, services, and adequate care for children.⁴³ Whether liberationists or protectionists, growing numbers of advocates for children in the 1960's and 1970's found that the language of "rights" offered a way to argue for both more protection and more independence for a variety of children.⁴⁴

This is where the rhetoric of children's rights began and this rhetoric moved the discussion from notions of children's needs to children's rights. This rhetoric of rights was not only used to place children in the same legal positions as adults, but also to seek special protections.⁴⁵ These developments in the 1960's and 1970's were a dramatic departure from the previous use of children as property of parents subject to parental and institutional authority beyond state review. Such authorities were questioned and deemed untrustworthy during the 1960's and early 1970's. Indeed, the United States Supreme Court began to recognize children as distinct individuals deserving a direct relationship with the state under a legal regime protecting liberties against public and private authorities.⁴⁶ A brief review of the Supreme Court's treatment of children's rights is instructive.

Until the 1960's, most Supreme Court cases involving children adjudicated conflicts between parents and state. As discussed above, in 1923, Meyer v. Nebraska⁴⁷ established a fundamental right of parental authority, declaring that the right of parents to "establish a home and bring up children," including the control of their education, is protected by the liberty (due

⁴² Martha Minow, What Ever Happened to Children's Rights?, 80 Minn. L. Rev. 267, 269 – 70 (1995).

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id. at 273 – 275.

⁴⁶ Id. at 277.

⁴⁷ 262 U.S. 390, 399 (1923).

process) clause of the fourteenth amendment. The Supreme Court reinforced this principle in Prince v. Massachusetts,⁴⁸ when it announced that “the custody, care, and nurture of the child reside first in the parents.” With few exceptions, in cases of conflict between parent and state the Court has held fast to this principle.⁴⁹ The Supreme Court’s adherence to the doctrine of parental authority was grounded in cases in which it was assumed that a harmony of interests existed between parent and child. When the interests of the parent and child diverged, the Court was forced to reconcile the principle of parental authority with the child’s constitutional rights.⁵⁰

The rhetorical principles guiding the Supreme Court in these cases have been that “neither the 14th Amendment nor the Bill of Rights is for adults alone,”⁵¹ and that “constitutional rights do not mature and come into being magically only when one attains the state defined age of majority.”⁵² In reaching its decisions, the Supreme Court was forced to balance these principles against the state’s responsibility for the education, moral development, and in some cases, rehabilitation, training, and punishment, of the child.⁵³

Another source of litigation concerning children arose from challenges to state laws classifying children on the basis of social or economic status, including demands for redistribution of economic resources and laws denying benefits to children because of their illegitimacy. These cases required the Court to assess the importance and reasonableness of the classification scheme and to weigh those against the child’s claim of discriminatory treatment.⁵⁴ Not only does an analysis of Supreme Court decisions affecting children’s rights demonstrate

⁴⁸ 321 U.S. 158, 166 (1944).

⁴⁹ Susan Gluck Mezey, Constitutional Adjudication of Children’s Rights Claims in the United States Supreme Court, 1953 to 1992, 27 Fam. L.Q. 307, 309 (1993).

⁵⁰ Id. at 309.

⁵¹ In Re Gault, 387 U.S. 1, 13 (1967).

⁵² Planned Parenthood v. Danforth, 428 U.S. 52 (1976)

⁵³ Mezey, *supra* note 49, at 309.

⁵⁴ Id. at 309 – 310.

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decreasing support for children's rights claims, the cases also demonstrate a great deal of inconsistency in the way the Supreme Court has handled children's rights cases.⁵⁵

For example, the Supreme Court accorded adult status to children in situations such as death penalty sentencing, but not in abortion rights. The Supreme Court was willing to override state policy by favoring children who are disadvantaged by their parents' marital status, yet unwilling to do so for children who were disadvantaged by their parents' economic status. Over the years, the Supreme Court appears to have assigned a lower priority to the children's interest than to the competing interests of the state and family.⁵⁶ Consequently, as the cases demonstrate, the Supreme Court's rulings often yield contradictory results: at times, applying adult principles of law to children, other times not; at times extending children's autonomy, other times not; at times protecting children from a hostile world, other times not. Moreover, the rationales for the decisions in these cases are often elusive.⁵⁷

To some observers, the Supreme Court's rulings lie in traditional principles of constitutional law and appear to be motivated more by the jurisprudence of the constitutional claim than by adherence to a child welfare theory. Each of the Supreme Court's children's rights decisions followed the pattern of decisions made for adult litigants. Just as the Supreme Court granted more leeway to states in the areas of privacy, the death penalty, search and seizure, and social welfare legislation for adults, it did the same with respect to children. The Supreme Court has looked at children's rights issues in a variety of contexts. It has considered criminal proceedings,⁵⁸ illegitimacy issues,⁵⁹ rights of children in the schools,⁶⁰ rights to abortion,⁶¹ and

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id. at 321.

⁵⁸ *Kent v. United States*, 383 U.S. 541 (1966) (waiver of jurisdiction by the juvenile court); *In Re Gault*, 387 U.S. 1 (1967) (right to counsel); *In Re Winship*, 397 U.S. 358 (1970) (standard of proof in juvenile courts); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (jury trial for juveniles); *Breed v. Jones*, 421 U.S. 519 (1975) (double jeopardy)

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child protection and commitment issues.⁶² The Supreme Court cases show that despite the urging of children's rights scholars and advocates, the Court has not arrived at a coherent theory to guide the outcome of cases brought by or on behalf of children.⁶³

As a result of these trends, a legal ambivalence came into the children's rights movement over the last several decades. Faced with repeated efforts by advocates to extend constitutional rights to children as is apparent in the above review of cases, in the 1970's the Supreme Court began balancing two starkly contrasting alternatives: extending adult rights to children, or simply treating children in important ways as subject to different authorities, institutions, and relationships than adults.⁶⁴ A third position emerged in the 1970's stressing traditional authority and warning against the conflicts and disorder that rights for children would engender. Such

in juvenile court adjudicatory hearings); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (death penalty); *Schall v. Martin*, 46 U.S. 253 (1984) (pretrial detention); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (death penalty).

⁵⁹ *Levy v. Louisiana*, 391 U.S. 68 (1968), (equal protection issues in an illegitimacy case); *Weber v. Aetna Cas. Insurity*, 406 U.S. 528 (1971); *New Jersey Welfare Rights Org. v. Cahil*, 411 U.S. 619 (1973); *Jiminez v. Weinberger*, 417 U.S. 628 (1974); *Matthews v. Lucas*, 427 U.S. 495 (1976); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Lalli v. Lalli*, 439 U.S. 259 (1978); *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Pickett v. Brown*, 462 U.S. 1 (1983); *Reed v. Campbell*, 476 U.S. 852 (1986); *Clark v. Jeter*, 486 U.S. 456 (1988).

⁶⁰ *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503 (1969) (protests in school); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (compulsory education for Amish); *San Antonio Ind. Sch. Dist. v. Rodrigues*, 411 U.S. 1 (1973), (school financing); *Goss v. Lopez*, 419 U.S. 565 (1975) (school suspension without hearing); *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment in schools); *Plyler v. Doe*, 457 U.S. 202 (1982) (tuition for undocumented aliens); *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (removing books from school library); *Board of Educ. v. McCluskey*, 458 U.S. 966 (1982) (school suspension); *Martinez v. Bynum*, 461 U.S. 321 (1983) (school residency requirements); *New Jersey v. T.L.O.*, 468 U.S. 1214 (1984) (searches in high school); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) (lewd speech in high school); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (student newspaper); *Kadramas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988) (payment of school bussing fees)

⁶¹ *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (abortion/parental consent); *Carey v. Population Serv. Int.*, 431 U.S. 678 (1977) (contraception); *Bellotti v. Baird*, 443 U.S. 622 (1979), (abortion/parental consent); *H.L. v. Matheson*, 450 U.S. 398 (1981) (abortion/parental consent); *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983) (abortion/parental consent); *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983) (abortion/parental consent); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (abortion/parental consent); *Guile v. Akron_Ctr. for Reproductive Health*, 497 U.S. 502 (1990) (abortion/parental consent); *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (abortion/parental consent)

⁶² *Parham v. J.R.*, 442 U.S. 584 (1979) (procedure for voluntary commitment); *Secretary of Pub. Welfare v. Institutionalized Juveniles*, 442 U.S. 640 (1979) (procedure for voluntary commitment); *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189 (1989) (state's duty to protect a child)

⁶³ Mezzey, *supra* note 49, at 322.

⁶⁴ Minow, *supra* note 42, at 277.

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rights, these critics claimed, would inject conflict and individualism into the sphere of family life and disturb the usual arrangements of caring for children.⁶⁵

According to Minow, by the 1980's, the movement for children's rights had failed to secure a coherent political and intellectual foundation, not to mention a viable constituency with political clout. Into this framework entered Robert Mnookin who captured the patchwork of judicial decisions governing children's legal status by stating there were three distinct themes.⁶⁶ First, he argued that parents have primary responsibility to raise children; second, the state has special responsibilities to children to intervene and protect them; and third, that children as people have rights of their own and have rights as individuals in relation to the family and in relation to the state. According to Mnookin, these themes are constantly in conflict.⁶⁷

By the late 1980's and early 1990's, a new approach to children's rights was emerging. Now, child protectionists focused on a redistribution of resources to help children. Such redistribution questions would be legislative questions, requiring electoral coalitions. This movement away from litigation to legislation has proved unsuccessful in varied efforts to garner support for children who have no ability to vote for themselves.⁶⁸

According to Minow, four reasons exist for the historic failure of children's initiatives. These include the fact that children do not vote and no other lobby has appeared on their behalf. Second, America has experienced cycles of child welfare reform and disillusion or the reforms of one generation become the problems to be reformed by a later generation, with the early reforms and subsequent problems cautioning against further reform. Third, children's needs are connected to larger intractable issues, such as economic problems, women in the work force

⁶⁵ *Id.* at 281 – 284.

⁶⁶ Professor Robert Mnookin is here quoted in the New York Times in Glenn Collins, Debate Over Rights of Children Is Intensifying N.Y. Times, July 21, 1981 at A1, B4.

without adequate child care, negative views of poor parents, failures of public education, abortion, and crime control. Fourth, our culture and ideology produce great resistance to state intervention in families, a resistance articulated by both the political left and right, and as a result, we treat other people's children as beyond public concern.⁶⁹

Several scholars, including Martha Minow, consider a final option based on international human rights for children that remains to be significantly explored. The human rights argument seeks to treat children not as candidates for children's rights or child protection, nor as adults with rights, but simply as human beings with certain basic human rights. Under this approach to children's rights, as human beings children deserve the rights of dignity, respect, and freedom from arbitrary treatment. This dignity, respect, and freedom does not displace or undermine parents, but instead reminds parents and other adults of their fundamental responsibilities towards children.⁷⁰

As human beings, children deserve economic and social benefits appropriate to their needs. Human rights in the international sphere depend upon development of a community that believes in such rights rather than an authority, such as the court or legislature, that will enforce rights. The vulnerability of international human rights for children to the willingness and commitments of adults at first seems like a weakness or failure to secure something with force. This vulnerability, according to Minow, becomes a strength because it reveals how dependent and interdependent children are upon adults. While children need some freedom from some things, they also need guidance, involvement, support, and even control to protect them from harms against which they cannot protect themselves. Nothing, according to Minow, is inherent

⁶⁷ Minow, *supra*, note 42, at 287.

⁶⁸ *Id.* at 294.

⁶⁹ *Id.* at 295.

in a rights rhetoric that prevents acknowledging such basic human rights of children.⁷¹ It is this acknowledgment of basic human rights being awarded to children that is at the heart of this approach to relocation disputes.

III. Legal Representation of Children and Standing in Removal Cases.

While children's rights theories and Supreme Court trends may be an interesting intellectual exercise, putting the theories into practice in relocation cases is another matter. The key to this appears to be adequate legal representation and advocacy of children's unique interests in relocation disputes. Significant legal and constitutional arguments can be made to justify a child's right to individual party status, standing, and to an attorney in relocation cases where such a status and an advocate could advance the child's unique interests in the relocation dispute.

In the now famous case of Gregory K.,⁷² an eleven year old boy filed a petition in his own name and with his privately retained legal counsel sought to terminate the parent/child relationship with his biological parents. Gregory K. also sought a declaratory judgment regarding his constitutional and other rights. The news media picked up on this story and characterized it as the first case where a minor child had "divorced" his own parents.⁷³ This case is relevant to children's standing as independent parties in relocation cases since it involved the somewhat novel issue of a child being able to file his own action and asserting a constitutional right to do so. The lower court in Gregory K. declared that minors have the same constitutional rights as adults to due process, equal protection, privacy, access to the courts, as well as the

⁷⁰ Id. at 296.

⁷¹ Id. at 297.

⁷² Gregory K. v. Ralph K., Nos. C192-5127 & JU90-5245 (Fla. Orange County Cir. Ct. 1992).

⁷³ George H. Russ, Through the Eyes of a Child, "Gregory K.": A Child's Right to Be Heard, 27 Fam. L.Q. 365 (1993).

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rights to defend life, liberty, and to pursue happiness.⁷⁴ This case has generated a national and international debate as to whether children should have access to the courts and the wisdom of granting that access.⁷⁵

From Roman times to the mid-nineteenth century, children were treated as something akin to property and had rights which might be characterized as falling somewhere between those of slaves and those of animals.⁷⁶ American common law tradition lumped minority with incompetency and denied children legal identity.⁷⁷ The basic rationale for depriving people of rights in any dependency relationship is that certain individuals are incapable of exercising or undeserving of possessing the right to take care of themselves.⁷⁸ Consequently, in such a situation a need exists for social institutions specifically designed to safeguard their position.⁷⁹ Early American society used the same reasoning to justify the treatment of women and African Americans.⁸⁰

According to Article XII of the United Nations Convention on the Rights of Children, children should have the right to express views freely in all matters affecting the child and the opportunity to be heard in any judicial or administrative proceedings in a manner consistent with the procedural rules of national law.⁸¹ Considering children to be persons with full rights of

⁷⁴ *Id.* at 366.

⁷⁵ Examples cited by George Russ include: Mark Hanson, Boy Wins Divorce from Mom, A.B.A.J., Dec. 1992 at 16; Phil Long and Susan Bloodworth, Child-Parent Divorce Case Goes to Court: Judge Will Decide 12-Year-Old's Fate, Houston Chron., Sept. 24, 1992, at A15; Anthony DePalma, Custody Decisions Dividing Experts, N.Y. Times, Sept. 27, 1992 at 27; Howard Davidson, Making Too Much of "Gregory K" and Too Little: The Talk of Kid Divorce Masks a National Tragedy, Wash. Post, Oct. 6, 1992, at A21; Howard Davidson, ABA Center on Children and the Law, A Legislative Legacy for "Gregory K" – Six Proposals for Meaningful Changes in the Law. (1993); Jerri A. Blair, Gregory K. and Emerging Children's Rights, Trial, 22 (June 1993).

⁷⁶ Russ, *supra* note 73, at 369.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 370.

citizenship represents an important transition in the children's rights movement.⁸² Although the United States Supreme Court assumed that the guarantees of the Constitution applied to children when it held that de jure segregation violated the rights of African American children in Brown v. Board of Education,⁸³ it was not until 1967 that the Supreme Court in In Re Gault⁸⁴ expressly held that children have constitutional rights. In 1972, the Supreme Court in Wisconsin v. Yoder⁸⁵ acknowledged that children are persons within the meaning of the Bill of Rights. Since then, the Supreme Court has repeatedly reiterated this holding.⁸⁶

Despite the recognition that children have some constitutional rights, courts have not granted children full citizenship with access to the courts and standing to participate in proceedings which profoundly affect their lives.⁸⁷ In most instances, the state, the guardian ad litem, or some other adult must bring the action on behalf of a child; if the proper adult refuses to bring an action or advocate the child's position, the child has no remedy.⁸⁸ For over two hundred years our nation has attempted to insure the safety and protection of children through the intervention of the state or other adults, or on behalf of the children through the doctrine of parens patriae.⁸⁹ Children themselves have been denied standing because of the belief that the existing system adequately protects their rights through guardians ad litem or other representatives.⁹⁰ This existing system, however, has failed miserably to protect and satisfy the needs of many thousands of children in our society.⁹¹

⁸² Id.

⁸³ 347 U.S. 483 (1954).

⁸⁴ 387 U.S. 1, 13 (1967).

⁸⁵ 406 U.S. 205 (1972).

⁸⁶ Russ, supra note 73, at 320-71.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id.

According to George Russ, the primary reason for the problem is that the system has no direct responsibility to the children themselves.⁹² With no political power, right to vote, or assets, children remain the most vulnerable members of our society.⁹³ The interests of children are frequently in direct conflict with those of adults or a child's needs may contrast with those of his or her biological parents, foster parents, or the social agencies concerned with them.⁹⁴ For this reason, once a child's custody is questioned, a child's rights cannot be represented adequately by either the adult claimant or the adult defendant, each of whom is advocating his other own interests. The child needs party status to appear before any court or administrative agency handling the case and should be represented independently of the adults as a person.⁹⁵

It is one thing to impose statutory regulations upon the activities of the children for their own protection; it is quite another to prevent children from coming into court when those very statutes actually harm the children, are unconstitutional on their face or as applied, or when those adults appointed to protect children fail to enforce those statutes and regulations on behalf of the child.⁹⁶ A blanket prohibition on all young people having standing to appear in court, regardless of age and competence, is unjustified and flies in the face of constitutional due process.⁹⁷ It is important to note that the right of court access has been recognized as a fundamental right.⁹⁸ Furthermore, the right of access to the courts requires adequate, effective, and meaningful access to counsel.⁹⁹

⁹² Id.

⁹³ Id. at 372.

⁹⁴ Id.

⁹⁵ Id. at 372. See also Joseph Goldstein, et al. Beyond the Best Interests of the Child (1973).

⁹⁶ Russ, supra note 73, at 371.

⁹⁷ Id. at 372.

⁹⁸ Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907) (“the right to sue and defend in the court is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.”)

⁹⁹ Bounds v. Smith, 430 U.S. 817, 822 (1997); Russ, supra note 67, at page 369.

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In many instances courts and commentators have deemed matters involving family relationships within the family to implicate due process rights; this would include custody matters, which arguably implicate a child's liberty interest.¹⁰⁰ At stake is a constitutionally protected liberty interest, and the Supreme Court has indicated that the term "liberty" has a broad meaning.¹⁰¹ Due process requires procedural protection of a parent's interest in the care, companionship, and custody of their children.¹⁰² No justifiable reason exists to assume that family relationships are any less important to a child than to a parent. Indeed, because of a child's unique vulnerability, such relationships should be presumed to be of far greater significance to a child.¹⁰³

Standing in court is a requirement of procedural due process, and a minor child has a right to procedural due process under the United States Constitution.¹⁰⁴ In a termination of parental rights case before the United States Supreme Court, Justice Rehnquist in a dissenting opinion recognized that on the other side of termination proceedings is "the often countervailing interest of the child."¹⁰⁵ According to Russ, it would seem to be that the best procedure for protecting children in matters involving their custody would be to: (1) allow them standing to be in court; (2) listen to what they have to say, both personally and through their legal counsel; (3) weigh what they say in light of all circumstances, including their age and maturity; and (4) then decide whether they are justified in the relief they request.¹⁰⁶

¹⁰⁰ Russ, *supra* note 67, at 373. Russ cites the following examples: Tari: Eitzen, *A Child's Right to Independent Legal Representation in a Custody Dispute*, 19 Fam. L.Q. 53 (1985); Note, *Due Process for Children: A Right to Counsel in Custody Proceedings*, 4 N.Y.U. Rev. Law & Soc. Change 177 (1974); Monroe Inker & Charlotte Perretta, *A Child's Right to Counsel in Custody Cases*, Fam. L.Q. 108 (1971).

¹⁰¹ Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

¹⁰² Stanley v. Illinois, 405 U.S. 645, 651 (1972); Russ at 373

¹⁰³ Russ, *supra* note 73 at 373

¹⁰⁴ *Id.* at 374.

¹⁰⁵ Santosky v. Kramer, 455 U.S. 745 (1982)

¹⁰⁶ Russ, *supra* note 73 at 375

In custody cases and matters involving the termination of the parent/child relationship, the child's interests often directly conflict with those of one or both of the parents, and very often with the state's interests. In those cases, children should be given party status and deemed to be indispensable parties to such proceedings.¹⁰⁷ Until children have direct access to the courts and a means of causing the state and other adults to be directly responsible to them their problems will not be solved. Allowing standing to children requires only that children have the opportunity to be heard. This concept is neither revolutionary nor frightening. Judges are paid to listen and then decide, not to decide not to listen. A particular child's maturity or capacity is more properly considered in determining the weight to be given to that child's testimony, rather than as the basis for arbitrarily denying the children access to the courts.¹⁰⁸ Failure to allow children standing is fundamentally unfair by prohibiting the one person who is most affected by custody, visitation, and termination decisions to directly and effectively communicate to a court.¹⁰⁹

A child, as a person, also has the right to pursue happiness. Children should be guaranteed the right to pursue happiness, not to "be happy." As Americans, we pride ourselves on our adversarial system of justice, premised on the concept that all interested parties are before the court to present their viewpoints through zealous advocacy. That assumption is that in this way all relevant information and persuasive evidence will be placed before a court to insure an informed and just decision with regard to those who have the most at stake in the proceedings.¹¹⁰ Once it is determined or accepted that children have constitutional rights of any nature, or even that they may have such rights, it must logically follow that they also have a concomitant right to

¹⁰⁷ Id.

¹⁰⁸ Id. at 376.

¹⁰⁹ Id.

legal counsel and access to the courts to obtain or enforce such rights. To allow that such rights may exist, but then deny the right to legal counsel to obtain or enforce the same would be the equivalent of no right at all. A right without a remedy is equally illusory.¹¹¹

The typical practice of appointment of a guardian ad litem to protect the interests of children in court proceedings, although helpful in many cases, does not serve as an adequate substitute for the constitutional right of due process that legal counsel would assure when a child's fundamental constitutional rights are at stake. The role of a guardian ad litem and that of a zealous advocate in the form of legal counsel are very different roles.¹¹² Parents who have been allegedly abusive, neglectful, and immature, are granted the right to counsel. So should children who are the subject of a custody or a termination proceeding.¹¹³ Chronological age is not the determining factor, but rather ability to understand the proceedings and the possible results from various courses of action. If the child is too young to assist in his or her own defense, the ethical rules require the attorney to maintain as far as possible the attorney/client relationship.¹¹⁴

In 1972, Henry H. Foster, Jr. and Doris Jonas Freed proposed a "Bill of Rights for Children," including the legal right to receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him or her to develop into a mature and responsible adult.¹¹⁵ On November 20, 1989, the United Nations General

¹¹⁰ Id. at 377.

¹¹¹ Id. at 378.

¹¹² Id. at 378 – 379.

¹¹³ Id. at 379.

¹¹⁴ Id. at 380. See also ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (Feb. 5, 1996).

¹¹⁵ Henry H. Foster, Jr. & Doris Jonas Freed, A Bill of Rights for Children, 6 Fam. L.Q. 343, 347 (1972).

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Assembly unanimously adopted the Convention on the Rights of the Child.¹¹⁶ As discussed above, this Convention states that a child should have the right to be heard in any judicial and administrative proceedings affecting the child, and that in all actions concerning children, the best interests of the child should be a primary consideration.¹¹⁷

As the above analysis indicates, there is ample authority for children to have standing as independent parties with their own legal representation in relocation disputes.

IV. Parent's Rights versus Children's Rights.

From 1953 to 1992, the United States Supreme Court heard forty-seven cases concerning children's rights. These cases can be classified into three categories: (1) children's rights v. state authority; (2) parental authority to raise children v. state authority; and (3) parent's rights v. children's rights.¹¹⁸ The Supreme Court has recognized that children are individuals with their own rights in cases where those rights have conflicted with state authority.¹¹⁹ The Court has held that parents have a fundamental interest in the care, custody, and management of their child.¹²⁰ Often these parental rights conflict with children's constitutional rights.

Rights of parents and children often come into conflict in custody disputes. When this occurs, whose rights should prevail? It seems that most courts, assuming they even recognize the child has separate rights/interests of his/her own, answer this question in favor of the parents. However, some support exists for the theory that the children's interests are superior to

¹¹⁶ United Nations Centre for Human Rights, Geneva, Human Rights Fact Sheet No. 10, The Rights of the Child, 1 (1990)

¹¹⁷ Id. at 15, 17.

¹¹⁸ Jerry A. Bahnke, Pawns or People? Protecting the Best Interests of Children in Interstate Custody Disputes, 28 Loyola of L.A. Rev. 699, 726 (1995).

¹¹⁹ Id. at 727.

¹²⁰ Id.

those of the parents.¹²¹ Further, there is no justifiable reason to assume that family relationships are any less important to the child than to a parent. Indeed, because of a child's unique vulnerability, such relationships should be presumed to be of far greater significance to a child.¹²² The problem facing children involved in custody disputes is that no court has declared the child's interest in family life as one of constitutional magnitude. As a result there are no uniform national rules that require courts to protect these interests when deciding custody cases, and the parents' rights often prevail over those of the children. Unfortunately, the United States Supreme Court and other state courts historically have maintained the concept of the family as a unit with broad parental authority over minor children. Viewed from this prospective, children are less like individual beings with rights of their own and more like property in which their parents have a constitutional interest.¹²³

Although both children and parents may be viewed as each having rights, there is little doubt that while the family unit remains intact, the parents' constitutional right to the care and upbringing of their children will prevail.¹²⁴ When the family unit breaks down, however, especially as a result of parental choice -- such as divorce or giving a child up for adoption -- control over a child's future shifts to the state. When the state assumes control over a child's future, it has the power to protect the child and act in the child's welfare. This power is derived from a state's parens patriae role to protect those persons who are unable to protect themselves. The best interests of the child standard in custody disputes is a reflection of this power.¹²⁵

¹²¹ Id. at 729. See In Re P, 277 A. 2d 566, 567 - 72 (N.J. 1971) (awarding custody to the "psychological" parents over the natural parents because the best interests of the child were paramount to the natural parents' interest in the custody of their child).

¹²² Bahnke, supra note 118 at 729.

¹²³ Id.

¹²⁴ Id. at 730. See also, Santosky, 455 U.S. at 753; Pierce, 268 U.S. at 534 - 35; Meyer, 262 U.S. at 399.

¹²⁵ Bahnke, supra note 118 at 730

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When states are placed in this parens patriae role, they should not allow the parents' interest in custody of their children to override the children's interest in their own upbringing. Once a conflict concerning a child's placement arises, the child's own "inner situation and developmental needs" should be the paramount consideration.¹²⁶ Family environment is arguably the most important factor in a child's development. A strong correlation exists between a child's family upbringing and his or her extra-familial relations. When a child's placement is at issue and the state is placed in a parens patriae role over the child, the state can fulfill its role by insuring that the child is placed in the home where it will receive parental love, affection, discipline, and guidance. This does not necessarily mean placing the child with his or her biological parents. Third parties who have established a psychological parent/child relationship are equally capable of filling a child's parental needs.¹²⁷ Although the Supreme Court has extended some constitutional protections to minor children, the Supreme Court is still unwilling to extend constitutional rights to children in custody disputes.¹²⁸

Courts have reluctantly, but increasingly, recognized that children have rights under the United States Constitution, when it comes to determining family relationships and it is unreasonable to remedy any purported breach of a parent's rights by curtailing the fundamental rights of the child. Albeit in the context of an adoption dispute, a recent California Court of Appeals decision articulates the issue well:

As a matter of simple common sense, the rights of children and their family relationships are at least as fundamental and compelling as those of their parents. If anything, children's familial rights are more compelling than adults, because children's interests in family relationships comprise more than the emotional and social interests which adults have in family life; children's interests also include the elementary and wholly practical

¹²⁶ Id. (citing Goldstein, et al, beyond the best interests of the child (1979).

¹²⁷ Id. at 730 – 731.

¹²⁸ Id. at 731.

needs of the small and helpless to be protected from harm and to have stable and permanent homes in which each child's mind and character can grow, unhampered by uncertainty and fear of what the next day or week, or court appearance may bring. In some situations, however, children's and parent's rights conflict and in these situations, the legal system traditionally protects the child.¹²⁹

The In Re Bridget court found that children have both procedural and substantive liberty interests protected under the due process clauses of the Fifth and Fourteenth Amendments, and that these interests include maintaining familial ties with prospective adoptive families with whom they have previously been placed pursuant to an apparently valid state adoption with an expectation of permanency. These interests also include protection against precipitous and traumatic removal from an existing custodial environment without inquiry into whether the removal would be detrimental to the child, whether some less detrimental alternative is available, and whether the removal and return to a birth parent is justified by a competing and equally compelling constitutional interest.¹³⁰

The Supreme Court has long recognized that children are persons with rights protected by the United States Constitution.¹³¹ The realm of personal family life is a fundamental interest protected by the Fourteen Amendment to the United States Constitution.¹³² This fundamental right belonging to both parents and children also has been recognized explicitly by several

¹²⁹ In Re Bridget R., 49 Cal. Rptr. 2d 507 (Cal. App. 1996), rev. denied, (cite Cal. 1996).

¹³⁰ 49 Cal. Rptr. at ____.

¹³¹ Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976) (“Constitutional rights do not mature magically only when one attains the state defined age of majority.”); In Re Gault, 387 U.S. 1, 13 (1967) (“neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”).

¹³² See, e.g., Santosky v. Kramer, 455 U.S. 745, 753 (1982) (there is a “historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment”); Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977); Smith v. City of Fontana, 818 F. 2d 1411 (9th Cir. 1987) (stating that a child's interest in continued companionship and society of parents is a cognizable liberty interest); Spielman v. Hildebrand, 873 F.2d 1377 (10th Cir. 1989) (adoptive parents like biological parents have a fundamental liberty interest in the familial relation).

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states.¹³³ The United States Supreme Court in Smith v. Organization of Foster Families¹³⁴ stated that biological relationships are not the exclusive determinants of the existence of a family:

The importance of the familial relationship to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association and from the role it plays in “promoting a way of life” through the instruction of children, as well as the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship.¹³⁵

Clearly, in custody disputes children do have constitutionally protected rights separate and apart from their parents. These rights exist in even heightened form in relocation disputes. These rights must be recognized and protected in these disputes.

V. Psychological Issues for Children at Stake in Relocation Cases.

Recent studies have indicated that significant psychological issues are at stake for children involved in relocation cases. Yet, there have as of yet been virtually no studies of this issue. Because of the importance of this issue to the analysis being advanced in this article, the author shall shamelessly borrow extensively from the only significant research that has been begun by Judith S. Wallerstein and Tony J. Tanke.

¹³³ See, e.g., Reist v. Bay Circuit Judge, 241 N.W.2d 55, 62 (Mich. 1976) (holding that the rights of parent and child in their “fundamental human relationship” are encompassed within the term “liberty”); Espinoza v. O’Dell, 633 P.2d 455 (Colo. 1981) (recognizing liberty interests in mutual relationship between child and parent)

¹³⁴ 431 U.S. 816, 844 (1977)

¹³⁵ Id. See also Lehr v. Robertson, 463 U.S. 248, 249, 261 (1983) (a “developed parent/child relationship” and not the “mere existence of a biological link” merits constitutional protection); Roberts v. United States Jaycees, 468 U.S. 609, 619 - 20 (1984) (“family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one’s life.”); Hawk v. Hawk, 855 S.W. 2d 573 (Tenn. 10th. Cir. 1993) (striking down Tennessee’s former grandparent visitation statute as unconstitutional when applied to a stable family absent a showing of substantial harm to the child if visitation were terminated); Williams v. Williams, 24 V.A. App. 788 (1997) (the parents’ right to autonomy and child rearing is a fundamental right protected by the Fourteenth Amendment, and state interference with that right must be justified by a compelling state interest; (“the

According to Judith Wallerstein and Tony J. Tanke, in order to protect children, courts need to understand a child's perspective on divorce and separation and to acknowledge the importance of that perspective in developing policy. The requisite judicial understanding in these cases includes the potential impact on the child of one parent's request to establish a new life elsewhere and the further potential impact on the child if his wish is realized or relinquished.¹³⁶ In grappling with these difficult relocation cases, courts should understand the anxieties in the child that divorce engenders and that are reawakened by the contemplated move, consider the factors associated with long term good outcomes in children following a divorce, and maintain these as guidelines in its policy; recognize the many expectable changes in the post-divorce family, both in ongoing relationships between parents and children over the years, and in the changing needs of the adults as they seek to reconstitute their separate lives; hear the child's voice as it is amplified through sensitive and caring adults before intervening in ways that will have a profound and long term impact on the child's current life and future well being.¹³⁷

The best interests of the child cannot be effected without a consideration of the child's feelings.¹³⁸ The heart and mind of the child ought to be central to the issue of relocation as well as other issues of family law. Wallerstein and Tanke criticize the courts and legal profession in America as overly committed to an implicit perspective of children as passive vessels of parental attitudes and interests.¹³⁹ In fact, children at a very early age have powerful feelings that do not necessarily reflect the feelings of the adults in their lives.¹⁴⁰

primacy of the parent/child relationship" requires proof that harm or detriment to the welfare of the child would result without visitation, before visitation may be ordered over the united opposition of the child's parents)

¹³⁶ Judith S. Wallerstein & Tony J. Tanke, To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce, 30 Fam. L.Q. 305, 306 (1996).

¹³⁷ Id. at 306, 307.

¹³⁸ Id. at 307.

¹³⁹ Id.

¹⁴⁰ Id.

While there is no published psychological or social research that specifically addresses the issue of relocation, existing bodies of knowledge, however, bear on the complex issues that relocation engenders. This comes from the extensive body of knowledge about the initial long term responses of children to divorce. A well developed body of knowledge exists concerning parent/child relationships in post-divorce and remarried families and how they are shaped in different custody and living arrangements. Existing research has identified factors that are significantly associated with good and poor outcomes among children and parents, and equally important, factors that have little significance in the psychological development of the child following divorce.¹⁴¹

A significant number of children in separated and divorced families suffer long term residual effects.¹⁴² Many children and adolescents develop a wide range of post-divorce symptoms that include very aggressive behaviors, depression, sleep disturbance, and learning problems. The child's access to both parents separately does not prevent these multiple responses to the divorce. At the time of the rupture children are concerned with their parents as well as themselves. They worry about whether and how their parents will be able to manage. The sorrow is intense as they mourn the loss of their family.¹⁴³

According to Wallerstein and Tanke, what we can infer about relocation and its impact on the child is that a relocation involves children who have already been traumatized by the breakup of their family at the parents' divorce.¹⁴⁴ Relocating to a new community is often arduous. While an intact family confronts these life challenges as a family, to a child of divorce, each disruption holds special perils and requires careful parental planning and support. For the

¹⁴¹ *Id.* at 308.

¹⁴² *Id.* at 308, citing Judith S. Wallerstein & Sandra Blakeslee, Second Chances: Men, Women, and Children, A Decade after Divorce (1989).

child, a relocation can represent a second, or sometimes a third edition of the original disruption.¹⁴⁵ Because of the instability and unpredictability of the employment market which has been exacerbated by the recent downsizing of businesses, the high incidences of remarriage, and the high incidences of second divorces, repeated, separate moves by each parent are coming to represent the norm. Children of divorce often experience many changes in neighborhood, schools, and friends.¹⁴⁶

The child of divorce also will experience changes within the family unit, including remarriage, new step-siblings, new half-siblings, and new networks of extended family relationships and mobility among the extended family members. Given the expected mobility and the residence of both parents, the child's community or network of support at the time of divorce, or at the time of the relocation request, cannot realistically be regarded as a continuing source of stability. Public policy designed to protect the child should consider these inevitable repeated changes in the geographic location and family relationships of both parents during the years following divorce and endeavor to provide safeguards within realistic expectations.¹⁴⁷

Several factors associated with good outcomes for children in post-divorce families include a close, sensitive relationship with a psychologically intact, conscientious, custodial parent; the dimension of conflict and reasonable cooperation between the parents; and whether or not the child comes to the divorce preexisting psychological difficulties.¹⁴⁸ When courts intervene in ways that disrupt the child's relationship with the custodial parent, serious

¹⁴³ Wallerstein & Tanke, supra note 136 at 309

¹⁴⁴ Id. at 309-310.

¹⁴⁵ Id.

¹⁴⁶ Id. at 310.

¹⁴⁷ Id. at 310. See also Eleanore E. Maccoby & Robert H. Mnookin, Dividing the Child: Social and Legal Dilemmas of Custody (1992)

¹⁴⁸ Id. at 310-11.

psychological harm may occur to the child as well as to the parent.¹⁴⁹ Following a divorce, a second or third disruption in the child's life has serious potential only for not creating more suffering, but for doing lasting psychological damage to a child who has already been traumatized by the divorce, and for whom repeated disruptions and relationships represent an experience which the hapless child dreads. A significant correlation exists between the parents' relationship with each other and the child's moral and emotional development. The cooperative interaction of the parents is critical to the child's healthy development and piece of mind. The high potential for continued or reopened conflict as in the relocation issue can severely threaten the child's sense of security.¹⁵⁰

The cumulative body of social science research on custody does not support the presumption that frequent and continuing access to both parents lies at the core of the child's best interests.¹⁵¹ While the psychological adjustment of the custodial parent has consistently been found to be related to the child's adjustment, that of the non-custodial parent has not.¹⁵² Neither is the amount of visiting of the non-custodial parent consistently related to the child's adjustment.¹⁵³ There is no evidence that frequency of visiting or amount of time spent with the non-custodial parent over the child's entire growing up years is significantly related to good outcome in the child or adolescent.¹⁵⁴ Rather, research indicates that it is the substance and character of the parent/child relationship, and not the particular form, that is critical.¹⁵⁵

The child's perception of the father in various domains of his life are of lasting importance in the creation of the child's self-image, capacity to relate to others, and conscience

¹⁴⁹ Id.

¹⁵⁰ Id.

¹⁵¹ Id. at 311.

¹⁵² Id. at 311-12.

¹⁵³ Id. at 312.

¹⁵⁴ Id.

formation. A child who feels abandoned or rejected by a father suffers tragically. Boys and girls alike need to feel loved and valued by a father who represents a moral and compassionate role model. However, research shows that no significant connection between frequency of visits and the time spent in the father's home during visits help the development of a nurturing father/child relationship.¹⁵⁶ Frequent access to the non-custodial parent for its own sake, when it involves shuttling back and forth between two homes, can be seriously detrimental to children when there is intractable, continuing high conflict between parents. The unintended effect is that the child feels emotionally safe nowhere.¹⁵⁷

Parents who have gone through a divorce effectively establish a new kind of family unit in which the child resides. Within that unit, when the parents opt for sole custody and visitation, the child looks primarily to the custodial or caretaking parent, and secondarily to the visiting parent for nurturance, protection, and guidance. To require divorcing parents to spend their lives in the same geographical vicinity is unrealistic. It also may undermine the divorce decision and threaten the child with continued instability throughout his or her childhood. Prohibiting a move by the custodial parent may force that parent to choose between custody of his or her child and opportunities that may benefit the family unit. Imposing this choice can be severely detrimental to the psychological and economic wellbeing of the parent over many years. It also has the potential of burdening the parent/child relationship for many years, regardless of the choice the parent makes. The child may well experience diminished parenting as a result of the parents' discouragement and suffering. Giving up a major life goal or prospective long-term relationship is a grievous loss. The child's knowledge that he or she has been the cause of the parents

¹⁵⁵ Id.

¹⁵⁶ Id. at 312-13

¹⁵⁷ Id. at 313- 314.

profound disappointment and losing a central goal in life can become a terrible burden for the child to bear.¹⁵⁸

A growing body of knowledge in child development speaks to the role of both parents in raising a child. The best interests of the child in relocation cases should take into account the practical and psychological realities of children living in post-decree families. A child's relationship with parents and the actual patterns of custody change as the child ages and matures. As a result, courts need to take careful note of the de facto custodial arrangement in the post-divorce family, at least over the year preceding the relocation request, as well as the legal provisions in the custody decree, which may not reflect the current realities of the child's life. When a child is in the de facto primary residential or physical custody of one parent, that parent should be able to relocate with the child, except in unusual circumstances. Relocation issues are more complex in the dual residential family. Here, an explicit moral and legal assumption operates that each parent values the role of the other in raising the child. Each parent, therefore, bears equal responsibility for maintaining the child's close relations with both parents to the extent possible. Here, stability and continuity favor protection of the child's relationship with both parents because both are, in a real sense, primary to the child's development. On occasion, the most significant relationship for the child may be that which obtains with the parent with whom he or she has spent less time.

Among the factors that Wallerstein and Tanke believe should be considered by the courts in regarding relocation issues are the following:

- (1) Travel: A child's capacity to travel to visit a distant parent has limits. Children should not be forced to spend a major portion of their growing years in constant travel.

¹⁵⁸ Id. at 314, 315.

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- (2) Changes in Residential Custody: Determination of custody should not be based on a parent's self-serving desires, whether to relocate or to remain in the post-divorce community. The best interests of the child are best served within the nurture and protection provided by high-quality parent/child relationships, and these relationships, rather than geographical convenience, should be paramount.
- (3) Geographical and other Stereotypes: Geographical chauvinism has no place in child custody decisions
- (4) Stability of Joint Legal Custody: Joint legal custody should generally remain intact following a relocation where both parents participate and there are not high negative factors such as a high degree of conflict.
- (5) Good Faith and Reasonableness of Proposed Move: Relocation should be taken honestly, carefully, and in good faith.¹⁵⁹

Ultimately, Wallerstein and Tanke conclude that it is imperative in relocation cases that courts adopt approaches designed to listen to the child.¹⁶⁰ Especially when younger children are involved, their voices should be heard by sensitive, well-trained persons who are independent of self-interested persons and other participants in the judicial process. The child should be allowed to express views privately and in confidence and without fear of adverse consequences. The child's experience would include his or her feelings of comfort or discomfort within each home, the relationship with stepparents and siblings, and other aspects of the experience to which parents may have little or no access. These perceptions may be critical. At the time of the relocation decision, the child's perceptions and wishes should be given greater weight than at the time of the divorce, because then, not only is the child older, but he or she possesses specific knowledge that was not available to the child at the time of the marital breakup. For older children, stability may lie not with either parent, but may have its source in a circle of friends, or in a particular sport, or academic activity within a school or community. These adolescents

¹⁵⁹ *Id.* at 319 – 321.

¹⁶⁰ *Id.* at 323.

should be given the choice as to whether they wish to move with the moving parent. It should also be made clear to them that their decision can be changed if parents can arrange this.¹⁶¹

VI. A Model Based on a Termination of Parental Rights Proceeding.

The above analysis has indicated that in relocation disputes, one must consider the significant rights and issues of children. These rights and interests must be protected through the appointment of attorneys and guardians. Clearly, however, parents also have significant rights and issues at stake in a relocation dispute. The question remains as to how those rights can be protected in the process and balanced with the rights of the children.

As stated above, parents have several constitutional rights at stake in these relocation disputes. First and foremost is the constitutionally protected right to raise their children as they deem appropriate with a minimal amount of intrusion by the state. Parents also have a constitutionally protected right to earn a living, to travel, and to carry on their lives. Parents' rights, however, are not absolute. A hierarchy of rights that must be considered are involved in relocation disputes, and as outlined above, it is the author's view that the rights of the children must be paramount.

As a model for analyzing the rights at stake in a relocation case, it is appropriate to consider the rights of the parents vis-à-vis their children and the state in a termination of parental rights proceeding (hereafter "TPR" proceeding).¹⁶² In a TPR proceeding, the petitioning party is typically the state or local agency of the state. Often a report is filed indicating that the children are being abused, neglected, or abandoned. The parties to the proceeding typically include the state, the child or children, and one or both parents whose rights to care, custody, and control of

¹⁶¹ Id. at 321 – 323.

the child is at stake and is threatened with being taken away in the process. In such proceedings, the relationship between the child and one or more parents may be irrevocably altered and custody of the child transferred elsewhere. Arguably in a relocation case, a similar and significant transformation occurs in the parent/child relationship, albeit at the instigation of one of the parties to the custodial relationship rather than the state. Nevertheless, in a TPR proceeding, the participants have constitutional and procedural rights that are very seriously protected throughout the proceeding.

Once a family is formed, the Constitution offers significant protection against state encroachment. However, under appropriate circumstances, the government may interfere with, or even destroy, the parent/child relationship.¹⁶³ Although procedures for interfering with the parent/child relationship are governed largely by varying state laws, some generalities are widely applicable. In most cases in which parental neglect is the basis for removal or a termination of parental rights order, the process consists of several stages.

The first stage, often referred to as the jurisdictional stage, usually focuses on the condition of the child, and is often subject to the jurisdiction of a juvenile court. After a child's condition is brought to the attention of a local social services agency, the agency conducts a preliminary investigation. Based on its findings, the agency determines whether continued intervention is necessary. If the preliminary investigation substantiates the need for intervention, a finder of fact hears evidence and, if appropriate, adjudicates the child to be in need of services or protection.

¹⁶² It must be emphasized that each state has its own TPR substantive and procedural law. The author is most familiar with Minnesota's statutes found in Chapter 260 of the Minnesota Code. See more specifically Minn. Stat. §260.291.

¹⁶³ David Shade, Empowerment for the Pursuit of Happiness: Parents with Disabilities and Americans with the Disabilities Act, 16 Law & Ineq. J. 153, 197 (1998).

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The court also determines whether removal of the child from the home is necessary for the child's protection. If the court removes the child from his or her home at this stage, the court usually must make specific findings of fact regarding the circumstances that caused the need for removal. The state also assumes an obligation to formulate a plan for family reunification, or if the state is convinced that this family will never be successfully reunited, a plan for termination of parental rights.

Most and perhaps all states additionally require the court to find that the local social services agency offers reasonable services to the family in an attempt to avoid the necessity of seeking a TPR order. If and when the state finally concludes that family reunification is no longer realistic, it may petition for a TPR order. The court may grant the TPR order if it finds by clear and convincing evidence¹⁶⁴ that the child's best interests require the TPR and it finds again by clear and convincing evidence some degree of parental unfitness. Thus, the TPR proceeding, when viewed in its entirety, is best seen as the intersection of varied requirements imposed by state and federal statutes and constitutions. Following the issuance of a TPR order, the child is placed either in an adoptive home or remains in foster care or some other form of state care until the child is adopted or reaches the age of majority.¹⁶⁵

In all TPR cases, the state has a very heavy burden since it is intervening in fundamental family relationships. This follows a long line of United States Supreme Court cases where it has been repeatedly recognized that parents retain a general right to freedom from governmental interference in child rearing decisions.¹⁶⁶ A long line of cases also provides for a fundamental

¹⁶⁴ See, *Santosky v. Kramer*, 455 U.S. 745 (1982).

¹⁶⁵ Shade, *supra* note 163 at 198 – 200.

¹⁶⁶ See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1997) (striking zoning ordinance that prohibited a grandmother from raising in the same household two grandsons who were cousins); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (granting Amish parents freedom to withdraw children from public schools after eighth grade); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking state law prohibiting teaching foreign languages to children).

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interest in the companionship, care, custody, and management of children; along with associated rights related to marriage and decisions about whether to bear children, this right has been described as “older than the Bill of Rights.”¹⁶⁷ In other words, as a matter of values widely shared in American society, certain forms of social engineering are beyond the power of the state. In constitutional terms, these rights are considered implicit in the due process clause of the Fourteenth Amendment as a form of liberty that may not be infringed upon without due process of law.¹⁶⁸

This brings us back to the issues at stake in a typical termination of parental rights proceeding. In such a case, the mode of parenting the child has been questioned by the state, a significant intervention is being contemplated, and a serious consequence is at stake: the ending of the parent/child relationship and the removal of the child. Most courts have concluded that a standard of proof by clear and convincing evidence would be constitutionally required in view of the fundamental nature of the right to family integrity.¹⁶⁹ Typically, in a TPR proceeding where this heightened burden of proof resides with the state and the trial court requires clear and convincing proof of the allegations, the parties and government agencies are provided with counsel, a guardian ad litem is almost always appointed for the children, attorneys are often appointed for the children, and a battery of experts, including social workers and psychologists, are involved in the process. Because the action has the potential to irrevocably alter the parent/child relationship, heavy burdens must be met and heightened evidentiary burdens of proof satisfied. In such cases, it is critical for the court to assess the particular needs and interests of the children, through both guardian ad litem and attorneys. It is also equally

¹⁶⁷ Stanley v. Illinois, 405 U.S. 645, 651 (1992); Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977).

¹⁶⁸ Moore v. City of East Cleveland, 431 U.S. at 501, 502.

imperative that the services provided to the family members be analyzed and assessed. A full evidentiary hearing follows.

An approach similar to a TPR proceeding could and should be taken in relocation cases. While it is not the state that has initiated the proceeding, the state has a vital interest in the welfare of the child through the doctrine of parens patriae. It would therefore be appropriate not only to have both parents represented by counsel, so should the children. These parties all have significant rights and interests at stake. A guardian ad litem should be appointed to objectively analyze best interests. Finally, experts such as social workers, psychologists, and school personnel should be involved to assess the significant psychological and development issues at stake. Given the importance of the outcome, it is critical that we recognize, respect, and protect the rights and issues involved in relocation cases and treat them with the same formality and seriousness as are accorded to the parties to a TPR proceeding are treated.

VI. Implementing a Children's Rights Approach to Relocation Cases.

At the core of the above analysis is the notion that if we are truly to analyze relocation cases so as to protect the children's best interests, the individual children affected by the relocation decision must be considered as the central subject of the dispute. Regardless of the age of the child, that child's interests must be articulated, advanced, and assessed objectively and independently. Given the historical evolution to a "best-interests" approach to custody, the changing nature and indeed the disappearance of childhood, the deeply embedded individual rights culture in our society, expanding notions of children's rights and legal representation and psychological studies indicating children's views must be considered, any other approach to these disputes is no longer tenable. Relocation disputes encompass all of the dramatic societal

¹⁶⁹ See generally Annotation, Validity of State Statute Providing for Termination of Parental Rights, 22 ALR 4th 774 ©Walling, Berg & Debele, P.A. 1998

changes that are currently occurring in our society: changes in the traditional family, increased mobility of working adults, women with their own significant careers, and ever evolving notions of custody and notions of childhood. A review of the now voluminous literature in the relocation area, important psychological studies now being produced, and the experience of attorneys, judges, social workers, and participants in these disputes reconfirms that there simply are no easy solutions to this problem. Any effective resolution of the issues is going to require resources, time, and where the participants are unable to enter into their own workable solutions, a decision made by a neutral fact finder based on appropriate and well articulated criteria and data.

The key to this best interests approach is that the children affected by the relocation decision -- just like the children in a TPR proceeding -- must be involved in the process and their desires known. This is not to say that the children's requests should be automatically granted. Representing children is an extremely complex endeavor. The weight to be given to a child's preference depends on a variety of objective and subjective criteria, including chronological age, level of maturity, assessment of outside pressures on the child's decision and a basic determination as to whether the child really wants to be involved in the process, and if so, how the child can be involved in the process. Regardless of the weight to be given to the child's desires, the child must be involved and represented independently in the process. Making these determinations will of course require a sensitive and well-educated judicial officer, experienced attorneys conversant in child development as well as substantive family law, and well-trained guardians ad litem, social workers, and child psychologists.

The undersigned has been a volunteer attorney with the Children's Law Center of Minnesota. This non-profit agency -- funded by donations from a variety of sources and staffed

extensively by volunteer attorneys engaged in all varieties of practice -- represents children in Minnesota involved in truancy, dependency and neglect, and TPR proceedings.. Representing children in these situations is not easy. Assuming one is able to establish contact with the child either in person or otherwise prior to the start of the proceeding, the attorney must provide the child with an overview of the process in language that the child can understand. This in and of itself requires some understanding by the attorney of child development and a rapport with the child. If the child does not wish to participate in the process, that information must be conveyed to the Court in a manner that does not jeopardize the attorney/client relationship. Very often the most significant role of the child's attorney in these cases is keeping the child informed of developments, keeping the matter moving forward procedurally, and protecting the interests and desires of the child to the extent those are known by the attorney.

If we are to have the children's voices heard in the removal cases, it will be critical that there are attorneys willing and able to represent children in these matters. Traditionally, judges have been reluctant to interview children or involve children in divorce and custody proceedings. As the above analysis indicates, this is no longer an option as broader society and family courts grapple with these difficult relocation cases. In addition to simply determining the parents' motives in the relocation case, it is critical that the courts also examine even more closely the impact of the relocation decision on the child.

While this analysis will undoubtedly cause significant consternation for persons who fear that our society has become too litigious, that our court system is too adversarial, and that this is one more manifestation of the breakdown of the family, we must move beyond such views. Family court problems are only going to become more intractable as the family configurations evolve and more litigants become involved in these disputes. We have now moved beyond

simply a parental rights analysis with all rights vested in the disputing parents. We now have step-parents, grandparents, persons who have become parents through assisted reproduction, foster parents, and a whole range of persons with a variety of attachments involved with the children in these proceedings. Difficult decisions must be made and can be made. Children are no longer to be treated as chattel. The concept of childhood as a passive period of dependence has changed forever. What we currently have in place is a system to resolve disputes that involves settlement in mediation at the front end, and if all that fails, then an adversarial system is in place to resolve the dispute. We must pay attention to the rights of individuals involved in these matters, and where the rights collide we must be prepared to analyze the situation objectively and with as much information as possible. To do this, the rights of the children involved in these proceedings must be placed at the forefront of the dispute.