Post-Decree Custody Modification:

Moving Out of State and Changes to the Parenting Relationship

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I. Introduction

A recent article in the Wall Street Journal reports on certain developments that are at the heart of the most difficult removal cases now facing divorced couples, courts, and lawyers:

> The pain of divorce wears new guises in the 1990's. The simultaneous rise of the dual-career couple and the divorce rate in recent years has created crises for an unprecedented number of American parents and children. ... Joint custody or visitation rights, difficult at best, can become a major problem when one parent is transferred or takes a job far away and the other is unable or unwilling to move, too. ... So people with careers they care about are torn between staying close to their kids and working where the opportunity is. The options all have drawbacks. Children are shuttled hundreds of miles back and forth between parents. A distant parent fades from the children's lives. A parent rejects a move in order to stay near the child and rues the sacrifice of career objectives.[3]

Several developments over the past several decades come to mind in order to explain this explosion in the number of removal cases arising in family courts across the nation. First, we live in an increasingly mobile society. It is not unusual for people to live miles away from where they were born, raised, and educated, and to have children with persons who hail from different states or even regions of the country. When divorces occur, parents may seek to return to an area where they have a network of family, friends, and relatives.

There have also been significant changes in employment trends during this same time period. The era of working for the same employer for one's entire career is long gone. People voluntarily change jobs and careers, often several times over a working life. In addition to voluntary career changes, we also live in a time of corporate downsizing and employment marked by increased instability. Parents choose or of necessity often need to move away to secure new employment or maintain current employment. The fact that more mothers work outside of the home, the increase in women entering the professions and in management, and family situations where women are primary wage-earners, when coupled with corporate transfers and corporate downsizing, have all contributed to the increase in removal issues, and then complexly being faced by the family courts.

These changes in employment demographics take on an additional complication when

[3]JoAnne S. Lublin, Cast Asunder: After Couples Divorce, Long-Distance Moves are Often Wrenching, Wall Street Journal, November 20, 1992.

divorced spouses remarry, often again creating another household with two working parents who, along with their blended families, are subject to career relocations or displacements.

Another factor complicating these removal cases is the increased involvement by many fathers in the rearing of their children. Often this has been necessitated by the dual career family trends discussed above, but also by the changing expectations of women and desires of men. The result is more frequent use of joint physical custody arrangements, or if not that, then often visitation schedules with more contact, more involvement by the non-custodial parents, and more at stake when either the non-custodial or custodial parent decides to move to another state for whatever reason.

As any practicing family attorney can attest, divorces involving custody are most often acrimonious, especially when there are two parents who have been very involved with the children. Especially with dual career households, or situations where one parent has roots and support in another state, the issue of relocation may significantly complicate the divorce proceedings. If not addressed by the parties through mutual agreement, the issue often needs to be addressed in a post-decree proceeding. Even with the increased prevalence of alternative dispute resolution techniques, removal disputes involve emotional and difficult issues that often serve as a focal point for the acrimony in the divorce arena. Furthermore, it is also quite clear that often the outcome of these disputes is driven by the unique facts of each case, and also by the values and beliefs of the judges hearing the disputes.

While there have been some scholarly articles written on the topic of removal over the last two decades, the topic has not been exhaustively reviewed for the purpose of assessing and comparing the various trends in how courts treat the issue of removal. Further, much of the literature takes on a polemical tone favoring the rights of the custodial or non-custodial parent and often discussing the rights -- constitutional and otherwise -- allegedly held by the participants.[4] The purpose of this article is to survey the case law across the country, focusing

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[4]**See, e.g., Anne L. Spitzer, Moving and Storage of Postdivorce Children: Relocation, the Constitution and the Courts, 1 Ariz. St. L. J. 1 (1985); Freed, Brandes & Weidman, Law and the Family, Relocation: A Child's Dilemma, New York Law Journal, Dec. 31, 1991; P. Raines, Joint Custody and the Right to Travel: Legal and Psychological Implications, 24 J. Fam. L. 625 (1985-1986); Note, A Proposed "Best Interests" Test for Removing a Child from the Jurisdiction of the Non-Custodial Parent, 51 Fordham L. Rev. 489 (1982); Note, Residence Restrictions on Custodial Parents: Implications for the Right to Travel, 12 Rutgers L. J. 341 (1981); Note, Restrictions on a Parent's Right to Travel in Child Custody Cases: Possible Constitutional Questions, 6 U. C. Davis L. Rev. 181 (1973); Laura E. Shapiro, Removal Issues and Standards for Modification of Custody, 24 The Colorado Lawyer 1045 (May 1995); Frank G. Adams, Child Custody and Parental Relocations: Loving Your Children from a Distance, 33 Duquesne L. Rev. 143 (1994);**

especially on the case law of the 1990s, to determine how family courts are addressing relocation issues. From this review, certain trends will appear, with the end result being some suggestions for courts to improve how these cases are handled and for attorney practitioners to better understand the issues at stake so that better results for all of the parties can be achieved.[5]

II. Overview of the Case Law

Family courts across the country have developed a myriad of ways to respond to removal cases, frequently by following a statutory framework and by addressing the unique facts presented by each case. In reviewing the standards applied by the various state courts across the country, the practitioner is cautioned that not only is each case unique on its facts, but some states have statutes governing this issue, and some do not.

The following is simply a cursory list of the issues that these courts have struggled to balance and consider in the typical removal case: (1) the best interests of the children, including their individual developmental needs; (2) the constitutionally protected right of the custodial parent to travel freely and start his or her life anew, just as the non-custodial parent has that right without restriction; (3) the right of the non-custodial parent to continue to have access to, and be involved with, the children; (4) the need to consider adjustments to joint custodial arrangements; (5) the impact of stipulations of the parties and/or provisions in decrees prohibiting removal; (6) the need to conserve judicial, financial, and emotional resources of all involved, yet at the same time fairly and thoroughly consider all relevant factors;(7) the need to consider presumptions, burdens of proof, and determine when evidentiary hearings are necessary

Given these disparate and often conflicting interests, it is small wonder that one appellate court judge in considering how to handle a removal case that came before his court made this trenchant observation:

> Our research has failed to reveal a consistent, universally accepted approach to the question of when a custodial parent may relocate out-of-state over the objection of the non-custodial parent. In fact, the opposite is true. Across the country, applicable standards remain distressingly disparate.

Carol S. Bruch and Janet M. Bowermaster, The Relocation of Children and Custodial Parents: Public Policy, Past and Presenrt, 30 Fam. L. Q. 245 (1996); Judith Wallerstein and Tony J. Tanke, To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce, 30 Fam. L. Q. 305 (1996).

[5]One group that has attempted to address the issue of relocation is the Special Concerns of Children Committee of the American Academy of Matrimonial Lawyers. They are currently in the process of drafting a Model Relocation Act.

Gruber v. Gruber, 583 A.2d 434, 437 (Pa. Super. 1990).

Initially, most courts took an ad hoc approach which emphasized much discretion to the trial court and consideration of the matter on a case-by-case basis. There was, of course, heavy emphasis on the ubiquitous "best interests of the children." In the 1970s, apparently in response to increasing numbers of removal cases, some states developed approaches that emphasized various presumptions, burdens of proof, or threshold requirements. The variety of approaches taken by state appellate courts and legislatures to deal with removal issues has remained quite diverse. In fact, as will be discussed below, the highest appellate courts in New York, California, Florida and Colorado have addressed these issues in 1996 and substantially altered the ways those states address removal issues. As will also be discussed, issues such as how to deal with agreements between parties in divorce decrees prohibiting removal from the state began appearing. Perhaps the area that is causing the most difficulty is how do deal with removal issues in the increasingly more common joint physical custody arrangements.

The following review of case law from around the country illustrates how the various states deal with removal cases and address these related issues. First, this article shall consider those cases where courts or legislatures have applied some type of presumption or burden of proof to resolve the removal issues. Then this article shall review those cases where states and courts still proceed on a case-by-case analysis. This will be followed by a review of some cases that consider agreements between parents regarding removal issues, followed by a consideration of the most difficult issue in removal law, what to do with joint physical custody arrangements. This review suggests the myriad ways to handle removal issues and highlights the fact that there simply are no easy ways to accommodate all of the conflicting emotional issues at stake and also the significant impact of the values and beliefs of each judicial officer hearing these cases. Hopefully, this review will also shed some light on how better to address these vexing issues.

A. Presumptions and burdens of proof

A review of the case law suggests that there are five primary types of analysis in this category. First, a growing majority of states give the custodial parent seeking to remove a presumption that he or she is acting in the children's best interest in the context of a new custodial unit and that parent will be allowed to move with the burden on the opposing parent to show the move would be harmful. Some states have adopted an approach whereby the moving custodial parent has the initial burden to show that the move will result in an advantage to the new custodial unit, and once that burden has been met, the court then considers a multi-faceted set of factors going to best interests. This approach has been dubbed the "real advantage approach" or "actual advantage approach."

Still other states have adopted an approach called the "exceptional circumstances" approach where the burden is on the moving party to show exceptional circumstances to justify

allowing the move. Other states have held that the moving party has the initial burden to make a prima facie showing that the move is in the children's best interests, with the burden then shifting to the opposing party to show detriment or endangerment. Finally, some states take the approach that there is a presumption against removal and the heavy burden is upon the parent seeking to remove the children to demonstrate that the removal is in the children's best interests.

1. Custodial parent presumed to be acting in the child's best interests

One of the first states to adopt this approach was Colorado in Bernick v. Bernick, 31 Colo. App. 485, 505 P.2d 14, 15-16 (1972). Here the court held that in the absence of a clear showing to the contrary, decisions of the custodial parent reasonably made in a good faith attempt to fulfill the responsibility imposed by the award of custody should be presumed to have been made in the best interests of the children. Similarly, the Minnesota Supreme Court early on adopted a strong presumption in favor of the custodial parent that has remained at the center of its removal law in Auge v. Auge, 334 N.W.2d 393 (Minn. 1983). Here it was held that the custodial parent is presumptively entitled to permission to remove the child out of state unless the party opposing the motion establishes that removal would endanger the child's physical or emotional health and is not in the best interests of the child, or that the purpose of the move is to interfere with visitation rights of the noncustodial parent.

In Holder v. Polanksi, 111 N.J.. 344, 544 A.2d 852, 856 (1988), New Jersey did away will the "real advantage" presumption discussed below and adopted an approach that any sincere, good-faith reason will suffice to give the custodial parent a presumption allowing the move to occur.[6] In In re Marriage of Smith, 491 N.W.2d 538 (Iowa App. 1992), the Iowa Appeals Court, in acknowledging that a custodial parent should only be denied the right to move in extreme circumstances, stated that the parent opposing the removal and seeking custody himself or herself must establish by a preponderance of evidence that conditions have so materially and substantially changed that the children's best interests make it expedient to grant the requested change of custody.[7]

The state of Kentucky treats the issue as a custody modification and places the burden on

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[6]This case, along with the earlier case of Cooper v. Cooper, 99 N.J. 42, 491 A.2d 606 (1984), was where New Jersey modified the standard it had first set forth in the influential case of D'Onofrio v. D'Onofrio, 144 N.J. Super. 200, 365 A.2d 27, 29-30 (1976). The D'Onofrio case is still widely cited across the country and will be discussed in greater detail below. Supra at ___.

[7]See also, In re Marriage of Montgomery, 521 N.W.2d 471 (Iowa Ct. App. 1994)(the burden is on the party resisting removal of children to another state to demonstrate that the move will detrimentally affect the child's best interests. The fact that the move is traumatic for the child is not a sufficient reason to justify shifting custody to the non-moving parent).

the parent opposing the proposed move to establish that the child's environment seriously endangers his or her physical, mental, or emotional health so that there was a likelihood that the child would be harmed if custody with the moving parent was not modified. Wilson v. Messinger, 840 S.W.2d 203 (Kent. 1992).

Courts in the state of Washington have placed an affirmative burden on the non-moving parent to provide sufficient proof that a restriction on the moving parent's request to leave the state is in the best interest of the child, as well as also proving that the proposed relocation would be detrimental to the child in some specific way that is not inherent in the geographical distance between the parents if the move is approved. In re the Marriage of Sheley, 895 P.2d 850 (Wash. App. Div. 1 1995), rev. granted (July 28, 1995 Wash.).

While courts in California, have been all over the map on the issue of removal, the California Supreme Court recently addressed the issue and held that a custodial parent has a presumptive right to change the children's residence. The court emphasized the need to maintain the custodial household and grant deference to the factual custodial relationship. The court declined requiring the trial courts to micro-manage every-day decisions about career and family, holding that the trial court may not require either parent to justify a residential choice. In re the Marriage of Burgess, 913 P.2d 473 (Cal. 1996).

In Tennessee, the state supreme court concluded that a custodial parent will be allowed to remove the child from the jurisdiction unless the noncustodial parent can show, by a preponderance of the evidence, that the custodial parent's motives for moving are vindictive -- that is, intended to defeat or deter the visitation rights of the noncustodial parent. In those situations where the noncustodial parent can show that removal could pose a specific, serious threat of harm to the child, that party may file a petition for a change of custody based on material change of circumstances. Aaby v. Strange, 1996 W.L. 189801 (Tenn. April 22, 1996).

In Russenberger v. Russenberger, 669 So.2d 1044 (Fla. 1996), the Florida Supreme Court, while recognizing Florida's strong policy of maintaining a close, continuing relationship between a child and both divorce parents, pointed to what it viewed as the "trend" among jurisdiction favoring permitting relocation. The court said that a request to relocate that is made in good faith should be favored, and that permitting relocation is the rule rather than the exception.

Finally, in In re Francis (Chobot), No. 94SC538 (June 3, 1996 Colo. Sup. Ct), the Colorado Supreme Court modified its previous approach and held that the child's best interests are served by preserving the custodial relationship, by avoiding relitigation of custody, and by recognizing the close link between the best interests of the custodial parent and the best interests of the child. In a removal dispute, this leads logically to a presumption that the custodial parent's choice to move with the children should generally be allowed. Thus, the custodial parent must

first present a prima facie case showing a sensible reason for the move (i.e., not a vindictive desire to interfere with noncustodial parent's visitation). Once that showing has been made, the burden then shifts to the noncustodial parent to show that the move is not in the best interests of the child. This can be done by showing that the custodial parent has consented to the modification of custody to the non-custodial parent, or the child has been integrated into the noncustodial parent's home or the child would be endangered by the move. If there is no credible evidence of endangerment, the noncustodial parent may also overcome the presumption by establishing by a preponderance of the evidence that the negative impact of the move cumulatively outweighs the advantages of remaining with the primary caregiver.

2. "Real Advantage" or "Actual Advantage" Approach

The first case to really advance this presumptive approach to removal cases was D'Onofrio v. D'Onofrio, 144 N.J. Super. 200, 365 A.2d 27, 29-30 (1976), perhaps the most widely cited case across the nation in this area of law. In this case, the New Jersey court stated that after divorce, the children belong to a "new family unit" consisting of the children and the custodial parent and what is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interests of the children. However, the custodial parent was held to have the burden of first demonstrating that some real advantage will result to the new family unit from the move.

Where the custodial parent meets that threshold burden, under the D'Onofrio analysis, the court is then to consider a number of factors in order to accommodate the compelling interests of all the family members: (1) the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children; (2) the integrity of the motives of the custodial parent in seeking the move in order to determine whether the removal is inspired primarily to defeat or frustrate visitation by the non-custodial parent; (3) whether the custodial parent is likely to comply with substitute visitation; (4) the integrity of the non-custodial parent's motives in resisting the removal; and (5) whether, if removal is allowed, there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for persevering and fostering the parent relationship with the non-custodial parent.[8]

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[8]The standard set out in this case was approved by the New Jersey Supreme Court in Cooper v. Cooper, 99 N.J. 42, 491 A.2d 606 (1984), but was then subsequently modified by that same court in Holder v. Polanski, 111 N.J. 344, 544 A.2d 852, 856 (1988) where it was held that any sincere, good-faith reason will suffice, and that a custodial parent need not establish a "real advantage" from the move. Despite this judicial modification, the D'Onofrio standard is here set out detail because of the numerous states that have adopted this as their method of resolving relocation cases. See, e.g., Bachman v. Bachman, 539 So.2d 1182 (Fla. 4th Dist. Ct. App. 1989); Matilla v. Matilla, 474 So.2d 306 (Fla. 3rd Dist. Ct. App. 1985); Yannas v. Frondistou-Yannas,

Similarly, in Gruber v. Gruber, 583 A.2d 434 (Pa. Super. 1990), the Pennsylvania court held that when a custodial parent seeks to relocate at a geographical distance and the non-custodial parent challenges the move, the custodial parent has the initial burden of showing that the move is likely to significantly improve the quality of life for that parent and the children. In addition, each parent has the burden of establishing the integrity of his or her motives in either desiring to move or seeking to prevent it. The court must then consider the feasibility of creating substitute visitation arrangements to ensure a continuing, meaningful relationship between the children and the non-custodial parent. Sensitive case-by-case balancing is required to ensure that all interests -- both parents' and the children's -- are treated as equitably as possible.[9]

According to the Nevada Supreme Court in Schwartz v. Schwartz, 812 P.2d 1268 (Nev. 1991), in considering a motion to remove a minor child from Nevada, the district court must first determine whether the custodial parent has demonstrated that an actual advantage will be realized by both the children and the custodial parent in moving to a location so far removed from the current residence that the regularly established visitation with the other parent will be precluded. If the custodial parent satisfies that threshold requirement, the court then considers the factors as set forth in the D'Onofrio case.[10]

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395 Mass. 704, 481 N.E.2d 1153 (1985); Hale v. Hale, 12 Mass. App. 812, 429 N.E.2d 340 (1981); Anderson v. Anderson, 170 Mich. App. 305, 427 N.W.2d 627 (1988); Bielawski v. Bielawski, 137 Mich. App. 587, 358 N.W.2d 383 (1984); Schwartz v. Schwartz, 107 Nev. 378, 812 P.2d 1268 (1991); Ramirez-Barker v. Barker, 107 N.C. App. 71, 418 S.E.2d 675 (1992); Fortin v.Fortin, 500 N.W.2d 229 (S.D. 1993); Taylor v. Taylor, 849 S.W.2d 319 (Tenn. 1993); Lane v. Schenck, 158 Vt. 489, 614 A.2d 786 (1992); Love v. Love, 851 P.2d 1283 (Wyo. 1993). Staab v.Hurst, 868 S.W.2d 517 (Ark. App. 1994)(Arkansas adopts the D'Onofrio approach in resolving removal disputes).

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[9]See also, Plowman v.Plowman, 597 A.2d 701 (Pa.Super. 1991).

[10]The Nevada Supreme Court again recently considered this issue in Cook v. Cook, 898 P.2d 702 (Nev. 1995). In this case, and several other cases, the Nevada Supreme Court expressed concern that trial courts were missapplying the Schwartz case so as to chain custodial parents, most often women, to the state of Nevada. Here the court held that a custodial parent seeking removal does not need to show a significant economic or other tangible benefit to meet the threshold "actual advantage" showing. If the custodial parent shows a sensible, good faith reason for the move, the district court should evaluate the other factors enumerated in Schwartz, i.e., D'Onofrio, focusing on whether reasonable, alternative visitation is possible. If reasonable alternative visitation is possible, the burden shifts to the noncustodial parent to show that the move is inimical to the children's best interests. See also, Gandee v. Gandee, 895 P.2d 1285 (Nev. 1995); Trent v. Trent, 890 P.2d 1309 (Nev. 1995).

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3. The "Exceptional Circumstances" Approach

One of the first courts to enunciate this approach was an appeals court in New York. In Hemphill v. Hemphill, 572 N.Y.S.2d 689 (A.D. 2 Dept. 1991), a New York court rejected the "equal protection" approach whereby short of an adverse effect on the noncustodial parent's visitation rights or other aspects of the children's best interests, the custodial parent should enjoy the same freedom of movement as the noncustodial parent. While balancing of rights is critical, this New York court maintained an "exceptional circumstance" approach, placing the burden on the moving party to show that exceptional circumstances justify allowing the removal.[11]

New York again applied this approach in Radford v. Propper, 597 N.Y.S.2d 967 (A.D. 2 Dept. 1993). Here the court held that the threshold question that must be answered is whether the proposed move would effectively deprive the noncustodial parent of that frequent and regular access to his or her children so as to require the relocating parent to demonstrate exceptional circumstances. Here the court should not look solely at numerical distance, but it should also take into account other factors such as travel time, the burdens and expense involved in traveling, the number of visitation hours that would ultimately be lost, the frequency of visitation, the regularity with which the noncustodial parent exercised visitation, and the involvement of the noncustodial parent in the lives of his or her children. Where a proposed move may or is likely to deprive a noncustodial parent of regular and meaningful access, two further tests must be satisfied by the custodial parent wishing to relocate: (1) the relocating parent must establish the existence of exceptional circumstances to warrant the relocation, such as some compelling concern for the welfare of the custodial parent or the children (remarriage of the custodial parent alone is rarely sufficient), and then the relocating parent must establish (2) that the relocation is in the best interests of the child.

4. Prima facie showing of best interests and a shifting burden to show detriment or endangerment

The Colorado Court of Appeals in In re Marriage of Murphy, 834 P.2d 1287 (Colo. App. 1992) held that a prima facie case for removal is established when the petitioner shows a sensible reason for the move and that the move is consistent with the child's best interests. Once a prima facie case is established, the burden shifts to the non-custodial parent. The court should grant

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[11] See also, Cassidy v. Kapur, 564 N.Y.S.2d 581 (A.D. 3 Dept. 1991). See also the most recent decision of New York's highest appellate court, discussed subsequently in this article, which overrules the "exceptional circumstances" approach. Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996)

removal unless the non-custodial parent proves that the child's move outside the state is detrimental to the child's best interests. The Colorado Supreme Court held that placing this burden on the opposing party is fair because it encourages private resolution of the emotional and ideological issues both parents invariably confront in these cases. Further, the nature of our mobile society combined with economic and social realities have now made these out-of-state moves frequent and predictable. Consideration of the best interest criteria here includes whether there is a sensible reason for the move, a reasonable likelihood the proposed move will enhance the quality of life for the child and custodial parent, the court is able to fashion a reasonable visitation schedule for the non-custodial parent after the move, the motives of the parent resisting removal, whether the non-custodial parent's motion to prevent removal is in effect a request for a change of custody and none of the modification criteria have been established, and the emotional harm that may be presumed to occur to the child if it is necessary or desirable for the custodial parent to leave the state and the child is not permitted to go.

The Wyoming Supreme Court in Love v.Love, 851 P.2d 1283 (Wyo 1993) observed that cases involving relocation of parents are fact sensitive. The court stated it would be remiss to attempt to define a bright line test for their determination. Courts must remember that the best interest of the child standard was applied at the time of the initial custody award. Therefore, the review looks more closely at balancing the continued rights of the parties with the best interests of the child as established at the time of the divorce. The test this court then chose to utilize is that so long as the court is satisfied with the motives of the custodial parent in seeking the move and reasonable visitation is available to the remaining parent, removal should be granted.

5. Presumptions against removal

While most states that have adopted presumptions or burdens of proof for their removal analysis favored removal, there are some states that have adopted presumptions and burdens against removal and in favor of custody remaining in the location where it was originally established. For example, in Eckstein v. Eckstein, 410 S.E.2d 578 (S. Caro. App. 1991), the South Carolina Court of Appeals discussed that state's presumption against removal. Yet, even with such a presumption, this court held that the trial court erred, based on the facts of the case, by requiring a wife who was given custody of the children to reside within a 250-mile radius of the residence of the father. While the trial court pointed to the adverse effect from not seeing their father regularly, there were no findings showing such a limitation was in the best interests of the children and the wife had demonstrated that she would probably be forced to move to another state in order to maximize her employment potential as an engineer and neither parent had family living in South Carolina. The case demonstrates that even with presumptions and burdens, removal cases are inherently fact driven.

Another New York case also presents a presumption against removal. In Raybin v. Raybin, 613 N.Y.S.d 726 (A.D. 3 Dept. 1994), the court observed that a geographic relocation

which substantially affects the visitation rights of the noncustodial parent gives rise to the presumption that such relocation is not in the child's best interest. The presumption may be rebutted upon a showing of exceptional circumstances by the relocating parent, including such things as exceptional financial, educational, employment, or health considerations which necessitate or justify the move.[12]

B. Cases without presumptions or burdens of proof

While it appears that most states have created presumptions and shifting burdens of proof in addressing removal cases, there are still a significant number of states that have declined to follow that type of analysis, finding each removal case to be unique on its facts. Most often these states treat these cases like modifications of custody cases, with the primary focus being what is best for the children in the unique circumstances of each particular case. What follows are some examples of the approach these states and appellate courts have taken.

In Jafari v. Jafari, 204 Neb. 622, 284 N.W.2d 554, 555 (1979), the Nebraska Supreme Court stated as a general rule that in cases where a custodial parent wishes to leave the jurisdiction for any legitimate reason, the minor children will be allowed to accompany the custodial parent if the court finds it to be in the best interests of the children to continue to live with that parent.

In Matter of Marriage of Meier, 286 Or. 437, 595 P.2d 474, 479 (1979), the Oregon Supreme Court held that despite competing interests of the parents, the determination whether to permit or prohibit removal of the child from the state is addressed to the sound discretion of the court, the paramount consideration being the best interests of the child. Similarly, in Arquilla v. Arquilla, 85 Ill. App.3d 1090, 407 N.E.2d 948, 950 (1980), the Illinois Supreme Court held that the test is not solely to establish the best interests of the child, but whether the general quality of life for both the custodial parent and the child will be improved by the removal.

In Marriage of Ditto, 52 Or. App. 609, 628 P.2d 777, 779 (1981), the Oregon Court of Appeals observed that in many cases the happiness and well-being of the custodial parent becomes an ingredient of the welfare of the children. In Henry v. Henry, 119 Mich. App. 319, 326 N.W.2d 497, 499 (1982), the Michigan Court of Appeals held that the best interests of the child is to be decided in an earlier custody hearing; the test for relocation is the best interests of the "new family unit" per D'Onofrio. The arbitrary imposition of the best interests of the child test in all matters concerning children is illogical at best and cruelly insensitive at worst.

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[12]See also, Bennett v. Bennett, 617 N.Y.S.2d 931 (A.D. 3 Dept. 1994). But see, Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996), in the next section, which overrules this approach in New York.

Despite the greater prevalence of presumptions favoring removal in the 1990's, some courts continue to avoid that approach and look at best interest criteria. For example, in Hoos v. Hoos, 562 N.E.2d 1292 (Ind. App. 3 Dist. 1990), it was held that the statute requiring notice be given to non-custodial parent of intent to move out of state does not impose upon the moving party the obligation of establishing a change of circumstances so substantial as to render the existing custody order unreasonable. This is true because the moving party is not seeking a change in custody, but seeking to maintain custody in a different location. Mere inconvenience to the child and non-custodial parent resulting from a change of residence will not constitute a basis for changing custody to the other parent.

In Smith v.Mobley, 561 N.E.2d 504 (Ind. App. 3 Dist. 1990), the Indiana court stated that the factors which are to be considered when determining whether to modify custody when the custodial parent indicates her intent to move out of the state include the distance involved in the proposed change of residence and the hardship and expense involved for the noncustodial parent to exercise his visitation rights. In this case, where custody was transferred from the moving mother to the father, the dissent criticized the majority for incorrectly treating this custody determination as if it were an initial custody decision and not a modification; in an initial proceeding the court presumes the parties are equally entitled to custody, while in a modification hearing the petitioner bears the burden of overcoming the custodial parent's right to continued custody. The dissent also criticizes the majority's reference to school, church, and community relationships as "crucial relationships," with the dissent finding the truly "crucial" relationship to have been that between the children and the moving custodial parent.[13]

In In re Marriage of Carlson, 280 Cal.Rptr. 840 (Cal. App. 5 Dist. 1991), a California appellate court, while applying California's statute addressing removal, held that it was appropriate to consider the effect the mother's contemplated move would have on the father's exercise of visitation and the father, as a noncustodial parent did not have an affirmative burden to prove the move would be detrimental to the children in order to obtain a restraining order. While noting that the noncustodial parent's ability to exercise visitation is not the sole or

[13]See also, Swonder v. Swonder, 642 N.E.2d 1376 (Ind. App. 4 Dist. 1994). When a custodial parent intends to relocate outside the state of Indiana, he or she must file a notice of intent pursuant to the state statute. The statute, however, imposes no burden of proof on the party intending to relocate, nor was the statute enacted to punish parents who move, but to provide a means for modifying vistation and support orders which would be made unreasonable because of a long distance move by the custodial parent. The key factor is the effect of the move upon the child and whether it renders a change substantial or inconsequential so as to justify a change of custody with the non-moving parent. An out-of-state move or the accompanying disruption of visitation are not by themselves circumstances mandating a change of custody.

preeminent factor, it is one of the significant considerations the trial court must take in to account in evaluating the child's best interests. The court also found the denial of the right to remove with the children did not violate the mother's constitutional right to travel, as she was not prevented from leaving the state without the children.

In Illinois, an appellate court in In re Marriage of Carlson, 576 N.E.2d 578 (Ill.App. 3 Dist. 1991), held that the trial court must determine whether current circumstances are such that removal from the state is in the best interests of the child and the court is not bound by the prior custody arrangement, even if those arrangements have been by agreement of the parents. Several factors for the court to consider are the likelihood that the proposed move will enhance the general quality of life for both the custodial parent and the children; the motives of the custodial parent in seeking the move; the motives of the resisting noncustodial parent; the interest of the children in having a healthy and close relationship with both parents as well as other family members; the visitation rights of the noncustodial parent; whether a realistic and reasonable visitation schedule can be reached. It is necessary to consider both direct and indirect benefits to the children from the proposed move.[14]

North Carolina provided in Ramirez-Barker v.Barker, 418 S.E.2d 675 (N.C. App. 1992), that a change in a custodial parent's residence is not itself a substantial change in circumstances justifying a modification of a custody decree. If, however, the relocation is detrimental to the child's welfare, the change in residence of the custodial parent is a substantial change in circumstances and supports a modification of custody. Likewise, if there is competent evidence that a proposed relocation of the custodial parent's residence will likely or probably adversely affect the welfare of the child, this evidence supports, in the event the move occurs, a finding of changed circumstances, which would then necessitate a "best interests" analysis. If, however, the evidence does not reveal any likely or probable adverse effect on the welfare of the child, the relocation of the child must be allowed and the visitation privileges modified. This court also adopted the D'Onofrio best interest factors.

In Kerkvliet v. Kerkvliet, 480 N.W.2d 823 (Wisc. App. 1992), the Wisconsin Court of Appeals, in applying its statute, held that the standard that must be met for modification where a removal is contested is that the modification in custody or physical placement must be in the best interest of the child and that the move will work a substantial change in circumstances. Factors

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[14]See also, In re Marriage of Creedon, 615 N.E.2d 19 (Ill. App. 3 Dist. 1993). Complaints about the unpredictability of these decisions and the lack of black-letter rules to some extent reflects a refusal to accept that the resolution of these cases requires a blancing process. The Illinois Supreme Court has wisely refused to take a one-sided approach, calling instead for decisions to be made on a case-by-case basis, depending to a great extent upon the circumstances of each case.

that the court must consider are the purpose of the proposed move, the effect of the proposed move and alternative arrangements to continue the child's relationship with the non-custodial parent.

A Missouri appellate court held in Carter v. Schilb, 877 S.W.2d 665 (Mo. App. W.D. 1994), that in determining whether to grant the custodial parent's motion to remove children from the state, the paramount concern is the best interests of the child. There are four factors which have been recognized in making this determination: (1) whether the prospective advantages of the move will improve the general quality of life for the parent and the child; (2) the integrity of the custodial parent's motives in relocating; (3) the integrity of the noncustodial parent's motives for opposing the relocation and the extent to which it is intended to secure a financial advantage with respect to continuing child support; (4) the realistic opportunity for visitation which can provide an adequate basis for preserving and fostering the noncustodial parent's relationship with the child if relocation is permitted. The court also stated that the denial of the mother's right to take the children with her out of the state was not a denial of her constitutional right to travel or right of freedom of personal choice in matters of marriage and family life. While the mother and her new husband are free to leave the state, there may not take the child as it is not in her best interest to move from Missouri.

In Virginia, it was held in Hughes v. Gentry, 443 S.E.2d 448 (Va. App. 1994), that it is well-settled law that a court may forbid a custodial parent from removing a child from the state without the court's permission, or it may permit the child to be removed from the state. In making such a determination, the court determines whether the relocation would be in the child's best interest. If the evidence suggests the move may not be in the child's best interests, the relocation constitutes a material change of circumstances supporting a review of custody.

In Pollock v. Pollock, 889 P.2d 633 (Ariz. App. Div. 1 1995), an Arizona appellate court stated that in removal cases, the interests of the parties and the child are to be best safeguarded by clear and careful fact finding rather than heightened burdens of proof or the inequitable application of constitutional rights for or against one party or the other. Factors the courts are to consider include (1) whether the request to move is made in good faith and not simply to frustrate the other parent's right to maintain contact with the child; (2) the prospective advantage of the move for improving the general quality of life for the custodial parent and the child; (3) the likelihood that the custodial parent will comply with modified visitation orders; (4) the extent to which moving or not moving will affect the emotional, physical, or developmental needs of the child; (5) the integrity of the non-custodial parent's motives in resisting the move. This court agreed that it is not a prerequisite for the custodial parent who wants to move to show that the move will result in a "real advantage" for the custodial parent and child. The prospective advantage is only one factor among many to be considered by the trial court.

Finally, the New York Court of Appeals recently changed completely the way that state

addresses removal issues. In Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996), the court held that the meaningful access and exceptional circumstances formula frequently employed by New York courts in resolving relocation disputes should no longer be used. Rather, each relocation request made by a custodial parent must be considered on its own merits with due consideration of all relevant facts and circumstances, and with predominant emphasis being placed on what outcome is most likely to serve the child's best interests. The non-exclusive list of factors includes each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and each parent, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the child and custodial parent's life may be enhanced economically, emotional, and educationally by the move, the feasibility of preserving the relationship between the child and noncustodial parent through suitable visitation arrangements.

C. Agreements between the Parties as to Removal

Another issue that occasionally appears in the case law addressing the issue of removal is what effect, if any, should an agreement between the parties that is placed in a stipulation and ultimately the judgment and decree have on the rights of the custodial parent to remove the children from the state. This may suggest one possible approach to addressing future removal cases: require the parties to address the possibility of removal at the time of the original custody decision and then determine how that decision will be enforced. Courts, however, have generally been reluctant to give up their ultimate ability to determine what is in the best interests of children, despite parental agreements and despite ever more crowded family court dockets.

One appellate case that has addressed that issue is Williams v.Pitney, 567 N.E.2d 894 (Mass.1991). This case involved joint legal custody and a separation agreement prohibiting removal without the other party's consent. The court applied the "real advantage" standard. The state statute, which contained the real advantage standard, was held to supersede the parties' own agreement and such an agreement was further held to not be an absolute bar to subsequent modification of the judgment. Thus, the court considered the agreement in the process of determining the best interests of the child and ultimately determined whether there was a real advantage to the move. Thus, in Massachusetts, the existence of an agreement between the parents had control over the court's analysis of the removal issue.

In Jones v. Jones, 903 S.W.2d 277 (Mo. App. W.D. 1995), the analysis of the agreement was largely the same as it had been in Massachusetts. The Missouri Court of Appeals held that language in a separation agreement incorporated into final dissolution decree regarding mother's right to move with the children to another state was not binding on the court and did not preclude the court, to the extent that was in the children's best interests, from ordering return of the children to Missouri.

D. Cases involving joint physical custody

Perhaps the area where there will be the most litigation in the future regarding removal issues will be in the context of cases involving joint physical custody. Joint physical custody, while its popularity rises and falls over time, does appear in general to be becoming more common. In this context, many of the presumptions discussed above have no relevance. Often, the courts simply are left with no alternative but to have a completely new custody trial with both parties resubmitting their positions as to custody.

In Jaramillo v. Jaramillo, 823 P.2d 299 (N.M. 1991), the New Mexico Supreme Court was faced with a case involving a removal motion in a joint physical custody arrangement. The court held that allocating burdens and presumptions in this context does violence to both parents' rights, jeopardizes the true goal of determining what is in the child's best interests, and substitutes procedural formalism for the admittedly difficult task of determining, on the facts, how best to accommodate the interests of both parents and the children. The court observed that procedure by presumption is always cheaper and easier than individualized determination, but when the procedure forecloses the determinative issues of competence and care, and when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. According to the Jaramillo court, in almost every case in which the change in circumstances is occasioned by one parent's proposed relocation, the proposed move will establish the substantiality and materiality of the change. It then becomes incumbent on the trial court to consider as much information as the parties choose to submit, or elicit further information on its own motion, and to decide what new arrangement will serve the child's best interests. In such a proceeding, neither parent will have the burden to show that relocation of the child will be in or contrary to the child's best interests. Each party will have the burden to persuade the court that the new custody arrangement or parenting plan proposed by him or her should be adopted by the court, but that party's failure to carry this burden will only mean that the court remains free to adopt the arrangement or plan that it determines best promotes the child's interests. Imposing any presumptions that the moving parent must show that the move is in the child's best interest violates that parent's right to freedom of travel, and placing a presumption on the non-moving party to show that proposed move would be contrary to the child's interests violates the liberty interest of that parent.

California faced this issue in In re Marriage of McGinnis, 9 Cal. Rptr.2d 182 (Cal. App. 2 Dist. 1992). This California appeals court held that the moving party must demonstrate that the move is in the best interests of the children, i.e., that it is essential and expedient and for an imperative reason. The court must also consider the effect of the move upon the children when an equally capable and involved parent remains in the community and offers the children the opportunity to remain where they have lived almost all of their lives. The court cited the California statute making mediation mandatory in removal cases -- another possibility in improving resolution of relocation issues. Illinois addressed the issue in In re Marriage of

Yndestad, 597 N.E.2d 215 (Ill. App. 2 Dist. 1992). Here the appellate court observed that petitions to remove a child from Illinois are governed by statute, despite any provisions in a joint parenting agreement purporting to limit the right of removal. The impact of the proposed removal upon the joint custody rights of the nonresidential custodian is, however, an important factor in determining whether removal is in the child's best interests. This factor is to be considered along with the other best interest criteria, such as the likelihood for enhancing the general quality of life for both the custodial parent and the children, the motives of the custodial parent in seeking the move, the motives of the noncustodial parent in resisting visitation, the visitation rights of the noncustodial parent, and whether a realistic and reasonable visitation schedule can be reached if the move is allowed.

In Rampolla v. Rampolla, 635 A.2d 539 (N.J. Super. A. D. 1993), a New Jersey appellate court held that in denying the mother's motion to relocate with the two children, the trial court erred in failing to address whether the father could relocate as a method of ensuring the vitality of the shared custody arrangement. The ability of the noncustodial party to also move is a factor not frequently considered by the courts but frequently argued by commentators favoring a presumption for custodial parents.

Minnesota, a state with one of the strongest presumptions favoring custodial parents in removal cases, addressed the issue of joint physical custody in Ayers v. Ayers, 508 N.W.2d 515 (Minn. 1993). The Minnesota Supreme Court held that in a joint physical custody situation, the presumption favoring the removing parent does not apply. Rather, the trial court must evaluate the move under the best interests criteria, just as in an initial custody determination. The court explicitly stated that the elevated endangerment standard used in modification cases in not to be used.

Colorado addressed the issue in In re Chester, 907 P.2d 726 (Colo. App. 1995). In a joint custody situation, the burden of proof for resolving a request by a parent to remove his or her children from the state is shared equally by both parents. Neither parent should bear the burden to show that relocation of the children will be in, or contrary to, their best interests, but instead each parent has the burden to persuade the court that his or her new parenting plan should be approved and the trial court must consider as much relevant information as the parties submit and decide what new arrangement will best serve the children's interests, including the factors previously set forth in Murphy above.

In Duckett v. Duckett, 905 P.2d 1170 (Or. App. 1995), the Oregon Court of Appeals held that in a case of joint physical custody where one parent seeks to move out of state with the child, the primary consideration is to be given to the best interest of the child. Further, maintaining the stability of the primary parental relationship is the overriding consideration. Undue weight must not be given to the desirability of the non-moving parent and child living near each other, but rather that is only one of many factors that must be weighed.

Kentucky held in Mennemeyer v. Mennemeyer, No. 92-CA-3080-S, (Ky. Ct. App. May 27, 1994), that where the parties shared joint custody and the father moved to modify custody based solely on the mother's planned relocation to Florida with the child, the appellate court reversed the trial court's granting the modification, holding a trial court may not modify a joint custody award over the objection of one party without first making a finding that there has been an inability or bad faith refusal of one or both parties to cooperate; removal alone is not enough. Any non-consensual modification must then be made anew under best interest criteria as if there had been no prior custody determination.

III. Conclusions

Several questions and seemingly intractable problems arise in this review of the case law regarding removal issues following divorce. First, family courts across the country struggle repeatedly with the question of how does one determine with any certainly the motives of a parent seeking either to remove or opposing such a move. Motives are an extremely subjective thing, yet they are the focus -- either overtly or covertly -- of many of the analyses applied by the courts. Also, it must be recognized as a reality of our judicial system that these decisions also hinge extensively on the values and beliefs of the judicial officers. Try as we might to set out rules and standards, decisions are ultimately made by human beings with their own biases and values.

Family courts also universally struggle with the question of balancing competing rights of the custodial parent to relocate, with the non-custodial parent's right to remain close to his or her children, with the need to consider the interests of the children above all else. It is apparent that these interests are ultimately impossible to completely balance and protect. One party to the trial will lose out. This, in turn, collides with the need for judicial economy and limited resources of the parties if full evidentiary hearings are always needed. It also raises emotionally charged gender issues, as women continue to remain custodial parents whose rights to relocate for life changes are frequently under scrutiny in these cases.

The case law above reviews a significant split among the jurisdictions as to whether or not to use presumptions and burdens of proof. This approach is no doubt an attempt to address the need to save family and judicial resources whenever possible. Certainly strong arguments can be made that removal cases are all so fact specific and the impact on the parent-child relationships so dramatic and certain that de novo consideration without rigid presumptions and burdens of proof is necessary. Most courts certainly seem to be taking that approach where joint physical custody is involved. The question that will need to continue to be evaluated is whether presumptions and burdens of proof have a place in this analysis or whether we should simply have all parties on an equal footing with equal burdens.

Pressing also, regardless of whether a court uses presumptions or simply considers best interests de novo, is the means by which a determination as to the best evidence to determine the impact of a removal or a denial of removal on the children is highly subjective. Courts need to consider whether a non-custodial parent will have access to the children for psychological testing and whether the other party should be required to submit to testing. Often when considering motives and purposes for the moves it is necessary to involve new spouses or other new family members. A question thus arises as to whether the court has jurisdiction over these non-parties and how best to access that information. Detailed custody evaluations involving more family members, social workers, psychologists, and court personnel may be necessary, all in a time of shrinking judicial resources.

In analyzing these issues, the children's needs must be primary. This, of course, will depend on the age of the child, but certainly with older children, their desires must be considered. We also need to broaden the nature of evidence we consider. For example, it should be possible to evaluate and compare school and religious opportunities, employment options, school options, crime statistics, and the like is determining whether the move has advantages that outweigh denying the move.

In addition to broadening our evidentiary sources and making our analysis more sophisticated, we must also make procedural changes. This certainly seems to be an area where alternative dispute resolution could be used. Mediation or arbitration would perhaps be a better place for the parties to air their reasons for moving and their reasons for opposing a move. It also would make sense to allow parties to write terms regarding removal into their divorce decrees and trust these will be enforceable absent a conflict with the child's best interests. Then, parties will be on notice as to what having custody or not having custody will mean in terms of their future planning.

Yet, we must be realistic that nothing changes more over time than family structures and relationships. We live in a time of less stability in employment, more remarriage and dual career families, and an ever more mobile society. Thus, it appears there will always need to be a mechanism to consider custody changes as divorced parents get on with their lives and move out of state. Burdens of proof and presumptions have their place, so long as they are not based on outdated gender stereotypes and so long as they do not become an absolute block to appropriate adjustments in the custodial arrangement. Often times in these cases the parties simply need an opportunity to voice their views and have a neutral entity make a decision. That is the purpose of the judicial system.

Ultimately, the best solution would be a system that allows parents to plan for moves at the time of the divorce and enter in to enforceable agreements. There must also be a well-funded judicial system that quickly and efficiently analyzes the issues in removal cases and applies a multi-factored test respecting the rights and interests of both parties and the children in the

context of a full evidentiary hearing. We must also involve a cadre of well-trained experts to assess the complex emotion issues inherent in these disputes. Finally, we must continue to explore the liberal use of alternative dispute methods.