

**CONSIGNING WOMEN TO THE IMMEDIATE ORBIT OF A MAN:  
HOW MISSOURI'S RELOCATION LAW SUBSTITUTES JUDICIAL  
PATERNALISM FOR PARENTAL JUDGMENT BY FORCING  
PARENTS TO LIVE NEAR ONE ANOTHER<sup>1</sup>**

INTRODUCTION

Shelly Osia had a simple request—she wanted to move with her children to a new residence thirty-two miles away.<sup>2</sup> Shelly and her husband had been divorced for less than a year, and Shelly found it difficult to adjust to post-divorce life in her current residence.<sup>3</sup> She had a long commute to work, traveling over fifty miles from her rural Missouri residence to her job in Saint Louis.<sup>4</sup> Her three children had various health problems:<sup>5</sup> one child had rather significant allergies and skin problems<sup>6</sup> and another child had ADHD, which resulted in problems focusing at school and completing homework.<sup>7</sup> The children's doctor was in St. Louis, and when the children had last minute health problems, Shelly would drive almost 200 miles from her job in St. Louis to pick up the children at school, take them to the doctor, return them home, and then drive back to her work.<sup>8</sup> Her ex-husband rarely assisted in these doctor visits.<sup>9</sup> These doctor visits were so common that Shelly reserved her vacation leave days for them.<sup>10</sup> The lengthy commute to work prevented Shelly from being able to prepare breakfast for the children and help them get ready for school. The children's grandmother helped them get ready for school each morning, but she was getting older and it was becoming increasingly

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1. The title makes reference to *Helentjaris v. Sudano*, 476 A.2d 828, 832 (N.J. Super. Ct. App. Div. 1984) (explaining that relocation restrictions that trap women in a geographic location where the only people who know her are those who know her as a couple with her husband are “consigning [her] for the next decade and a half to the immediate orbit of a man to whom she was briefly and unhappily married, to what is for her an alien environment in which she has neither family nor professional ties”).

2. Appellant's Brief at 5, *Osia v. Osia*, 260 S.W.3d 438 (Mo. Ct. App. 2008).

3. *Id.* at 5.

4. *Id.* at 6.

5. *Id.* at 6–8.

6. *Id.* at 7–8.

7. Appellant's Brief, *supra* note 2, at 6–9.

8. *Id.* at 8.

9. *Id.* at 11.

10. *Id.* at 8.

difficult for her to be able help.<sup>11</sup> The long commute also prevented Shelly from arriving home much earlier than 6:00 p.m., which left her little time to help with the children's nightly homework.<sup>12</sup>

The children's school district did little to ease Shelly's stress. Because of a shortage of staff and students, multiple grade levels were combined into one classroom,<sup>13</sup> and two of her children persistently struggled with their grades.<sup>14</sup> Her son with ADHD had such a hard time concentrating that his tests had to be read aloud.<sup>15</sup> The school psychologist recommended that the child receive individual tutoring or Title I instruction, but the school had few resources outside of the classroom, and Shelly had to argue with the school to get her son the individual instruction he needed.<sup>16</sup>

Shelly decided to move to another town so that the children would be able to attend a school better equipped for their needs and to shorten her own work commute.<sup>17</sup> In compliance with Missouri's statute regarding relocation, she sent a letter to her ex-husband notifying him that she planned to move with the boys in seventy-six days.<sup>18</sup> To show her good faith in seeking to relocate, she offered to provide half of the transportation<sup>19</sup> and pay for the increased tuition and child care costs.<sup>20</sup> Her letter explained that her reasons for moving were to "improve the children's education, to allow her to attend more school activities, and so that the children would be closer to their doctor's office."<sup>21</sup>

Shelly had already purchased a new home in the town where she wished to live.<sup>22</sup> In anticipation of relocation, she offered her current residence for sale, which sold before her case made it to trial.<sup>23</sup> As a result, she and her sons temporarily had to move in with her mother nearby while she awaited the relocation trial and her subsequent appeal.<sup>24</sup>

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11. Appellant's Brief, *supra* note 2, at 8.

12. *Id.* at 8–9.

13. *Id.* at 6.

14. *Id.*

15. *Id.* at 7.

16. Appellant's Brief, *supra* note 2, at 8–9.

17. *Id.* at 9.

18. *Id.*; Appellant's Brief exhibit 2 at A18, *Osia v. Osia*, 260 S.W.3d 438 (Mo. Ct. App. 2008) (letter from Shelly Osia to Raymond Osia (Mar. 16, 2007) (on file with author)) [hereinafter Letter from Shelly Osia].

19. The children's father had previously been providing all of the transportation. Appellant's Brief, *supra* note 2, at 9; Letter from Shelly Osia, *supra* note 18.

20. Appellant's Brief, *supra* note 2, at 10.

21. *Id.*; Letter from Shelly Osia, *supra* note 18.

22. Appellant's Brief, *supra* note 2, at 9; Letter from Shelly Osia, *supra* note 18.

23. Appellant's Brief, *supra* note 2, at 10.

24. *Id.*

Shelly's ex-husband opposed the relocation for two reasons.<sup>25</sup> First, he complained that the increased distance would add twenty minutes driving time to each visitation,<sup>26</sup> despite Shelly having offered to allow him to pick up the children earlier, which would have given him more overall time with the children.<sup>27</sup> Second, he wanted the children to remain in the school that they had been struggling in so they could continue to play on their sports teams.<sup>28</sup>

The trial court denied Shelly's relocation request.<sup>29</sup> She appealed to the Missouri Court of Appeals for the Eastern District, which affirmed the trial court's opinion with a mere memorandum opinion,<sup>30</sup> the type of opinion the court issues when it believes that the facts and law in the case would add nothing helpful to a body of law.<sup>31</sup>

Shelly Osia is merely one example of a parent who has been harmed by Missouri's restrictive relocation law. Relocations are becoming increasingly prevalent in today's society and relocation law concerns continue to perplex scholars and courts.<sup>32</sup> Commentators have remarked that relocation issues are "one of the most important topics currently affecting domestic relations law."<sup>33</sup>

Parents move for career opportunities, educational opportunities, family proximity, marriage, and changing neighborhood preferences.<sup>34</sup> In today's modern society, changing residences is a common occurrence—on average, families move once every seven years.<sup>35</sup> Divorced families are generally more likely to relocate than intact families.<sup>36</sup> Seventy-five percent of divorced

25. *Id.*

26. *Id.*

27. *Id.*

28. Appellant's Brief, *supra* note 2, at 11.

29. Judgment at A2, *Osia v. Osia*, No. 05WA-CC00096-01 (Mo. Cir. Ct. 24th Cir. Jul. 23, 2007).

30. *Osia v. Osia*, 260 S.W.3d 438 (Mo. Ct. App. 2008) (per curiam).

31. MO. SUP. CT. R. 84.16(b), available at <http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/e43a2575286b55ef86256ca6005215d2?OpenDocument>.

32. Lucy S. McGough, *Starting Over: The Heuristics of Family Relocation Decision Making*, 77 ST. JOHN'S L. REV. 291, 293 (2003) (noting that the issue has been a feminist and father's rights issue, has piqued the attention of social scientists, and inspired conferences, symposia, and international surveys).

33. Jill S. Kingsbury, "Mommy, Are We Moving? No . . . Maybe . . . Yes . . . ."—*The Evolution of Missouri's Relocation Law*, 60 J. MO. B. 83, 83 (2004).

34. See Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons From Relocation Law*, 40 FAMILY L.Q. 281, 282 (2006).

35. *Id.*; see also Amie J. Tracia, *Navigating the Waters of Massachusetts Child Relocation Law: Assessing the Application of the Real Advantage Standard*, 13 SUFFOLK J. TRIAL & APP. ADVOC. 139, 139 (2008) (stating that one-fifth of Americans change their residence each year).

36. Edward S. Snyder, *Relocation Made Easier: In Baures, The Court Seems to Further Alleviate the Burden Applied to Custodial Parents Seeking to Relocate*, 165 N.J. L.J. 930, 930 (2001). The most common family-related reason for relocation is change in marital status.

mothers will relocate “within four years after separation or divorce,” and half of those mothers will relocate again.<sup>37</sup> This upsurge in mobility is attributed to increases in technological development, women in the workforce, remarriage, as well as an unstable and unpredictable employment market.<sup>38</sup>

It is “unrealistic” to expect divorced or never-married parents to remain indefinitely in the same geographical area and, in most cases, it would be improper for courts to “exert pressure on them to do so.”<sup>39</sup> In Missouri, however, like many other states, it is often very difficult for custodial parents to relocate with their children.<sup>40</sup> Relocation is difficult even when the move is a short distance away, even if the parent’s motive for seeking to relocate is proper.<sup>41</sup> While modern laws no longer allow husbands an explicit right to choose their wife’s domicile, in practice restrictive relocation laws perpetuate the outdated notion that consigns women and children to the immediate orbit of a man.<sup>42</sup>

To be clear, this Comment uses the phrases “custodial parent,” “relocating parent,” and “mother” interchangeably. It also uses “non-custodial parent,” “non-relocating parent,” and “father” interchangeably. These terms are meant

McGough, *supra* note 32, at 292. “Three out of four custodial mothers move at least once within the four years immediately following a divorce.” *Id.*

37. Sarah Gottfried, *Virtual Visitation: The Wave of the Future in Communication Between Children and Non-Custodial Parents in Relocation Cases*, 36 FAM. L.Q. 475, 476 (2002).

38. Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105, 118 (2007); see Lance Cagle, *Have Kids, Might Travel: The Need for a New Roadmap in Illinois Relocation Cases*, 25 N. ILL. U. L. REV. 255, 264 (2005); 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, 310 (1996).

39. Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245, 246 (1996) (quoting *In re Marriage of Burgess*, 913 P.2d 473, 480–81 (Cal. 1996)); see also *Michel v. Michel*, 834 S.W.2d 773, 776 (Mo. Ct. App. 1992) (quoting *In re Marriage of Greene*, 711 S.W.2d 557, 564 (Mo. Ct. App. 1986) (“In [a] highly mobile society, it is unrealistic to inflexibly confine a custodial parent to a fixed geographical area, if removal to another area for reasons such as change of employment, remarriage, etc., is consistent with the best interest of the minor children.”)).

40. The term “custodial parent” refers to the parent exercising the most amount of time with the child. The parent who exercises visitation with the child is termed the “non-custodial parent” regardless of whether the custodial arrangement is actually a joint custody arrangement, or a sole custody arrangement with visitation rights. These terms are used to recognize the time allocation between parents in joint custody situations and sole custody situations are often indistinguishable. See Janet M. Bowermaster, *Sympathizing With Solomon: Choosing Between Parents in a Mobile Society*, 31 U. LOUISVILLE J. FAM. L. 791, 792 n. 3 (citing LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 251 (1985)).

41. Although one Missouri family law scholar has argued that Missouri’s relocation law has progressed “to a policy that tends to favor relocation,” in practice, it is extremely difficult for a custodial parent to succeed in a contested relocation battle. See Kingsbury, *supra* note 33, at 83.

42. *Helentjaris v. Sudano*, 476 A.2d 828, 832 (N.J. Super. Ct. App. Div. 1984).

to highlight the gender bias inherent in relocation jurisprudence,<sup>43</sup> and the reality that well over 80% of parents seeking court-ordered relocation are mothers.<sup>44</sup> This terminology is consistent with the terminology used by other family law scholars.<sup>45</sup> It is this author's experience, that Missouri's relocation law, much like the relocation laws of other states, applies primarily, if not exclusively, to mothers seeking to relocate. In the author's review of all published Missouri appellate opinions in relocation cases, the author was not able to find a single instance where Missouri's relocation law was used to bar a father from relocating with his children.

This Comment argues that Missouri's approach to relocation is fundamentally flawed and "jeopardizes the stability of custodial arrangement[]" for the sake of the utopian idea that forcing parents to live in the same geographical area will create a "simulation of unity."<sup>46</sup> This Comment focuses specifically on Missouri's relocation laws, but many of the problems discussed are not unique to Missouri; rather, they are part of a larger national problem. The critique of the law and the suggestions for change discussed here may be applicable to any state seeking to improve their relocation laws. Part I provides a general overview of child custody and relocation law in Missouri and discusses how courts decide relocation cases. Part II discusses the ongoing debate regarding the competing values of custodial parents and non-custodial parents in relocation disputes. Part II incorporates sociological and psychological research showing the impact of relocation on children and parents. Part III discusses the numerous problems with Missouri's relocation law. Finally, Part IV advocates for a change in Missouri's relocation law and suggests a model that protects both the interest of the mother and the father in relocation cases while emphasizing the best interests of the child and encouraging judicial consistency in relocation decision-making.

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43. See *infra* Part III.D.1.

44. See The Hon. W. Dennis Duggan, *Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation*, 45 FAM. CT. REV. 193, 198 (2007).

45. See, e.g., Alix Gravenstein Pastis, *Residence Restrictions on Custodial Parents: Sex-Based Discrimination?*, 16 GOLDEN GATE U. L. REV. 419, 421 (1986); Bruch, *supra* note 34, at 282, n.4.

46. Taylor v. Taylor, 849 S.W.2d 319, 333 (Tenn. 1993) (quoting *Helentjaris*, 476 A.2d at 832); Laura Caviness Cocus, Comment, *Louisiana's Restrictive Relocation Laws: Jeopardizing Stability in Custodial Arrangements for the Sake of Geographical Proximity Between Divorced Parents*, 53 LOY. L. REV. 79, 82 (2007).

## I. GENERAL OVERVIEW OF RELOCATION LAW

A. *Initial Custody Determination*

When parents divorce, or when a child is born to unmarried parents, courts make initial custody decisions regarding the child using a “best interests of the child” analysis.<sup>47</sup> Courts may award joint custody to the parents or sole custody to one parent.<sup>48</sup> Joint physical custody denotes a sharing of custodial time with the child between the two parental residences; but the amount of time sharing can vary greatly between individual joint custody orders. One parent is typically designated as the primary residential custodian—that is, the parent with which the child resides for the majority of the time. Courts also fashion parenting plans that create a visitation schedule between the parents and explain how costs and decisionmaking authority will be allocated.<sup>49</sup> Once courts make an original determination of custody, changes to custody are made only when there are substantial changes in circumstances that require the court to modify the original decree.<sup>50</sup> This principle is based on the child’s need to have a stable relationship with his or her parents as well as the advantages in reducing the child to conflict by discouraging frequent litigation between the parents.<sup>51</sup>

B. *Missouri’s Relocation Law*

After the initial custody determination, a custodial parent wishing to move must comply with Missouri’s relocation statute.<sup>52</sup> Missouri’s relocation law only restricts moves made by the primary custodial parent.<sup>53</sup> Because courts are constitutionally forbidden from prohibiting an adult’s right to travel,<sup>54</sup>

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47. See MO. REV. STAT. § 452.375 (2000).

48. *Id.*

49. *Id.*

50. *Id.*

51. See generally Wallerstein & Tanke, *supra* note 38, at 307; JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 20 (1996).

52. MO. REV. STAT. § 452.377 (2000).

53. Although nothing in Missouri’s relocation law specifically limits the law only to the primary custodial parent, a comparison of Missouri’s law with scholarly literature indicates that this is true for Missouri also. Compare *e.g.*, Pastis, *supra* note 45, at 419–20, and Bruch, *supra* note 34, at 283, with MO. REV. STAT. § 452.377 (2000).

54. See generally Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 67–81 (1996). Although no Missouri case has made such a statement, and Missouri’s relocation law, on its face, appears to apply equally to both parents, all the scholarly literature and many sister state appellate opinions have made clear that relocation statutes like Missouri’s prohibit only the custodial parent from moving. In the author’s review of hundreds of Missouri relocation opinions, she did not discover a single case in which Missouri’s relocation statute was used to restrain the relocation of the noncustodial parent, typically a father.

restrictions on the custodial parent's mobility are justified as only preventing the move of the child: in other words, the courts cannot prevent the primary custodian from moving, but they can prevent her from moving with the child.<sup>55</sup>

In contrast, courts do not prevent noncustodial parents from relocating, even if it would substantially impact the previous visitation schedule or negatively impact their relationship with the child.<sup>56</sup> A noncustodial parent's reasons for moving are irrelevant, and so are the objections of the custodial parent.<sup>57</sup>

Missouri's laws restrict all relocations made by custodial parents, no matter if they are across the country or across the street.<sup>58</sup> Although many other states define a relocation as a move exceeding a certain distance (such as sixty or 150 miles),<sup>59</sup> Missouri does not protect the right of parents to move short distances away without being the subject of litigation and a potential change in custody.<sup>60</sup>

55. See Janet Leach Richards, *Children's Rights v. Parent's Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. REV. 245, 255–56 (1999).

56. See, e.g., Pastis, *supra* note 45, at 420; Richards, *supra* note 55, at 255; Bruch, *supra* note 34, at 283

57. Bruch, *supra* note 34, at 283.

58. See MO. REV. STAT. § 452.377 (2000); see, e.g., Sarah Downey, *The Moving Van Wars: Relocation Is Becoming an Increasingly Contentious Issue for Ex-Spouses Who Must Balance Kids and Jobs*, NEWSWEEK, Feb. 28, 2000, at 53, available at <http://www.newsweek.com/id/82959>.

59. LA. REV. STAT. §§ 9:355.1–9:355.17 (2006) (outside of state or 150 or more miles); OR. REV. STAT. § 107.159 (2007) (sixty or more miles from other parent); UTAH CODE ANN. § 30-3-37 (2008) (outside of state or 150 or more miles); Fossum v. Fossum, 545 N.W.2d 828, 832 (S.D. 1996) (reversing the trial court's order to transfer custody to the father when custodial parent sought to move seventy miles away for employment and holding that the general rule is that minor geographical changes should not be regarded as substantial changes in circumstances to change custody). There have been several attempts to change Missouri's relocation law to allow parents to move short distances away, but they have not been passed by the legislature. See S.B. 1006, 90th Gen. Assem., 2d Reg. Sess. (Mo. 2000) (sixty miles); H.R. 722, 90th Gen. Assem., 2d Reg. Sess. (Mo. 2000) (thirty miles); S.B. 539, 91st Gen. Assem., 1st Reg. Sess. (Mo. 2001) (sixty miles); S.B. 539, 91st Gen. Assem., 1st Reg. Sess. (Mo. 2001) (Sen. Sub. Substitute) (thirty miles); H.B. 1270, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007) (fifty miles); H.B. 2123, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008) (fifty miles); H.B. 369, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009) (fifty miles).

60. When Missouri changed its relocation law in 1998, fathers' rights advocate Senator McKenna proposed that there be an absolute prohibition from relocating the residence of a child further than fifty miles from the child's current residence unless there was written consent of the other parent or an order of the court. Karen Plax & Catherine J. Barrie, *1998 Changes In Missouri's Family Law Statutes*, 54 J. MO. B. JAN.–FEB. 1998 at 330. But the Missouri Bar and the legislature considered “[a] specific mileage restriction on a custodial parent's relocation of a child within the state [to be] arbitrary, unreasonable and probably unconstitutional. However, some limitation on intrastate relocation was appropriate.” *Id.* This view focuses solely on the area where a court could restrict a parent's movement, and ignores the possibility of creating a mileage area where a custodial parent could presumptively be entitled to move without court

Missouri's relocation laws were modeled after the American Academy of Matrimonial Lawyer's ("AAML") Proposed Relocation Act.<sup>61</sup> Missouri law requires that parents provide notice by certified mail with return receipt<sup>62</sup> of a proposed relocation at least sixty days before the date of the proposed relocation.<sup>63</sup> The notice must give the proposed new address (or city if the exact address is unknown), telephone number, date of the move, the reasons for the relocation, and a proposal for revised schedule of custody.<sup>64</sup> There is a continuing duty to update the information as it changes.<sup>65</sup>

If a parent fails to give the required statutory notice, the consequences may be drastic. Failure to provide notice can be a factor in deciding whether custody should be modified,<sup>66</sup> a basis for ordering the child to return,<sup>67</sup> or as cause for requiring the relocating parent to pay the objecting party's attorney's fees and expenses.<sup>68</sup> Additionally, failure to provide notice may be deemed a change in circumstances to modify custody or serve as a basis for holding the parent in contempt,<sup>69</sup> loss of custody of the child,<sup>70</sup> or even criminal penalties.<sup>71</sup>

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scrutiny. The irony is, such a plan would be more flexible for primary custodial parents who were seeking to relocate since it presumably gives them permission to move within fifty miles of the previous residence. The current law, with no guidance given to mileage, allows courts to restrict parents from moving even within fifty miles. See Appellant's Brief, *supra* note 2, at 4–11. Although arbitrary, courts often consider mileage requirements when fashioning visitation schedules. For example, see the widely used court-approved visitation form, which presumes that a non-domiciliary parent should not receive mid-week visitation unless the parent lives within a fifty-mile radius of the child. MO. SUP. CT., COURT APPROVED PARENTING TIME FORM 68-A "SCHEDULE J," available at <http://www.courts.mo.gov/file.jsp?id=3673>.

61. Plax & Barrie, *supra* note 60, at 330; American Academy of Matrimonial Lawyers Proposed Model Relocation Act, An Act Relating to the Relocation of the Principle Residence of a Child, 15 J. AM. ACAD. MATRIMONIAL LAW 1, 6–11 (1998) [hereafter Model Relocation Act].

62. No court, however, has required that the notice meet these technical requirements. See Kingsbury, *supra* note 34, at 86; Kell v. Kell, 53 S.W.3d 203, 208–09 (Mo. Ct. App. 2001); Weaver v. Kelling, 53 S.W.3d 610, 616 (Mo. Ct. App. 2001); Baxley v. Jarred, 91 S.W.3d 192, 205–06 (Mo. Ct. App. 2002).

63. MO. REV. STAT. § 452.377.2 (2000).

64. *Id.* § 452.377.2 (1–4).

65. *Id.* § 452.377.3.

66. *Id.* § 452.377.5(1).

67. *Id.* § 452.377.5(2).

68. MO. REV. STAT. § 452.377.5 (3) (2000).

69. *Id.* § 452.377.12; Chris Ford, *Untying the Relocation Knot: Recent Developments and a Model for Change*, 7 COLUM. J. GENDER & L. 1, 8 (1997); Bowermaster, *supra* note 40, at 794 & n.11.

70. See Pastis, *supra* note 45, at 419; Bowermaster, *supra* note 40, at 794 & n.13.

71. See Ford, *supra* note 69, at 8–9 (noting that moving in violation of the court order could be deemed a criminal violation of the Parental Kidnapping Prevention Act); Bowermaster, *supra* note 40, at 794 & n.12 (citing cases where fines or imprisonment were imposed).



If the non-relocating parent wishes to object to the relocation, he or she must file an objection with the court within thirty days of receipt of the relocation notice accompanied by an affidavit explaining the specific reasons why the court should prohibit relocation.<sup>72</sup> The party seeking to relocate must, in response, file an affidavit within fourteen days, supporting the reasons for the relocation and suggest a revised parenting plan.<sup>73</sup> If the non-relocating parent does not file an objection within thirty days, the parent has waived his or her right to object to the relocation and the primary custodial parent is allowed to relocate without court approval.<sup>74</sup> If, however, the non-custodial parent files an objection within thirty days, the custodial parent is not allowed to move until the court renders a decision.<sup>75</sup>

In contested relocations, the custodial parent wishing to move bears the burden of proving that the relocation is made in good faith and is the child's best interests.<sup>76</sup> Although the statute does not define "good faith,"<sup>77</sup> the court has defined good faith, for purposes of the relocation statute, as the "relocating parent's motive or purpose for relocating being something other than to disrupt or deprive the non-relocating parent contact with the children."<sup>78</sup> In essence, the court has defined good faith as a lack of bad faith.

The issue of when relocation is in the child's best interests is more complex. Before the passage of Missouri's 1998 relocation statute, Missouri courts developed a four-factor test to determine whether a relocation should be allowed. The courts considered:

(1) [T]he prospective advantages of the move in improving the general quality of life for the custodial parent and child, (2) the integrity of the custodial parent's motives in relocating (whether primarily to defeat or frustrate visitation and whether the custodial parent is likely to comply with substitute visitation orders), (3) the integrity of the noncustodial parent's motives for opposing relocation and the extent to which it is intended to secure a financial advantage with respect to continuing child support, and (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.<sup>79</sup>

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72. *Id.*

73. *Id.*

74. *Id.*; see also *Baxley v Jarred*, 91 S.W.3d 192, 205–06 (Mo. Ct. App. 2002).

75. MO. REV. STAT. § 452.377.7 (2000).

76. *Id.* § 452.377.9.

77. See MO. REV. STAT. § 452.375 (2000).

78. *Swisher v. Swisher*, 124 S.W.3d 477, 481 (Mo. Ct. App. 2003).

79. *Michel v. Michel*, 834 S.W.2d 773, 777 (Mo. Ct. App. 1992) (quoting *Haralambie Handling Child Custody Cases*, § 7.08 (1983)).

After the 1998 change in the statute, lower courts modified the *Michel* test.<sup>80</sup> In 2001, however, the Missouri Supreme Court declared that the *Michel* test was inconsistent with the new statute and that the new statute only required that courts consider: (1) if the move is in the child's best interest; (2) if it is made in good faith; and (3) it complies with the statute.<sup>81</sup> Missouri trial courts now apply the eight "best interests" factors set forth in § 452.375.2 when making decisions for initial custody placement or modifications:

- (1) The wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties;
- (2) The needs of the child for a frequent, continuing and meaningful relationship with both parties and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child;
- (3) The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests;
- (4) Which parent is more likely to allow the child frequent, continuing, and meaningful contact with the other parent;
- (5) The child's adjustment to the child's home, school, and community
- (6) The mental and physical health of all individuals involved, including any history of abuse of any individuals involved . . . ;
- (7) The intention of either parent to relocate the principle residence of the child; and
- (8) The wishes of a child as to the child's custodian<sup>82</sup>

Although residence restrictions on a parent's relocation with the children were initially based on concerns about parental kidnapping and forum shopping, many of these concerns were alleviated by uniform laws governing the jurisdiction of child custody actions.<sup>83</sup> The more modern reason for Missouri's joint custody preference and relocation restrictions is the belief that children need frequent and continuous contact with two parents to thrive and to mitigate the damage of divorce.<sup>84</sup> Some scholars argue that it is important for

80. *Sadler v. Favro*, 23 S.W.3d 253, 257–58 (Mo. Ct. App. 2000).

81. *Stowe v. Spence*, 41 S.W.3d 468, 469 (Mo. 2001).

82. *See, e.g., Dorman v. Dorman*, 91 S.W.3d 167, 172 (Mo. Ct. App. 2002); *Cullison v. Thiessen*, 51 S.W.3d 508, 511–12 (Mo. Ct. App. 2001); *Abernathy v. Meier*, 45 S.W.3d 917, 924 (Mo. Ct. App. 2001).

83. *See Bowermaster, supra* note 40, at 797–98.

84. *See* MO. REV. STAT. § 452.375.2 (2000); Edwin J. Terry et al., *Relocation: Moving Forward or Moving Backward?*, 31 TEX. TECH. L. REV. 983, 1013 (2000) (citing Frank F. Furstenberg, Jr. & Andrew J. Cherlin, *THE FAMILY AND PUBLIC POLICY* 73 (1991)); *but see*

both the mother and the father to continue to co-parent their children to minimize the disruption divorce has caused.<sup>85</sup> Others argue that forcing children to endure prolonged court battles that their parents wage over relocation and preventing mothers from pursuing their post-divorce goals threatens lasting psychological as well as economic damage upon both the mother and the child.<sup>86</sup>

## II. DEBATE OVER RELOCATION STANDARDS

About half of all American children spend approximately five years in a single-parent household.<sup>87</sup> Divorce creates a crisis in a child's life that causes the child to grieve for the loss of their intact family.<sup>88</sup> A child's post-divorce experiences and the way adults manage those experiences have a pronounced impact on a child's personality and ability to establish adult relationships.<sup>89</sup>

Psychologists have found several key factors that can improve or hinder a child's distress after divorce.<sup>90</sup> The most important consideration is the impact the psychological health and parenting practices of the custodial parent (usually the mother) can have on the child.<sup>91</sup> Fathers, too, may make important contributions to the financial, social, and emotional well-being of children; although "the contribution is not made through a man's sheer physical

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*infra*, notes 95–112 and accompanying text (discussing the psychological research that refutes that frequent contact with a parent is at always at the core of the child's best interests).

85. Terry et al., *supra* note 84, at 1013 (citing Frank F. Furstenberg, Jr. & Andrew J. Cherlin, *THE FAMILY AND PUBLIC POLICY* 73 (1991)); Wallerstein & Tanke, *supra* note 38, at 311.

86. *See, e.g., id.* at 307–15.

87. Bruch, *supra* note 34, at 282 (citing Marsha K. Pruett et al., *Critical Aspects of Parenting Plans for Young Children: Interjecting Data into the Debate About Overnights*, 42 *FAM. CT. REV.* 39, 39 (2004)).

88. Brief of Amici Curiae Supporting Affirmance of the Ct. App.'s Decision at 3, *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004) (No. S107355) (citing PAUL R. AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* (1997)); E. MAVIS HETHERINGTON & JOHN KELLY, *FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED* 111–14 (2002); JUDITH S. WALLERSTEIN, ET AL., *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* xxviii–xxx (2000).

89. Brief of Amici Curiae Supporting Affirmance of the Ct. App.'s Decision, *supra* note 88, at 4 (citing HETHERINGTON & KELLY, *supra* note 88, at 10 (2002)); Wallerstein & Tanke, *supra* note 38, at 308–10.

90. Brief of Amici Curiae Supporting Affirmance of the Ct. App.'s Decision, *supra* note 88, at 4.

91. *Id.* at 4–5 (citing Eleanor Maccoby, *Divorce and Custody: the Rights, Needs, and Obligations of Mother, Father, and Child*, in *THE INDIVIDUAL, THE FAMILY, AND SOCIAL GOOD: PERSONAL FULFILLMENT IN TIMES OF CHANGE* 135, 164–65 (Gary Melton ed., 1995); HETHERINGTON & KELLY, *supra* note 88, at 126.

presence”<sup>92</sup> but rather, through the “quality of the relationship [with the child].”<sup>93</sup>

Many courts have started to realize that what is good for the custodial parent (typically the mother), is often good for the child.<sup>94</sup> Studies have found that effective parenting by the custodial parent is the single best line of defense against the stressors a child faces in post-divorce life.<sup>95</sup>

In contrast, inter-parental hostility and aggression is the single most destructive force in the lives of children of divorce.<sup>96</sup> Consistent hostility and aggression undermines a child’s sense of safety, which in turn prevents the child from maintaining a positive attitude toward future life experiences and can contribute to anxiety and phobias.<sup>97</sup> In fact, frequent contact and transitions between warring parents is likely to aggravate a child’s suffering, rather than to promote his or her best interests.<sup>98</sup> For this reason, family law scholars have noted that when parents are hostile or violent, a distant move

92. Brief of Amici Curiae Supporting Affirmance of the Ct. App.’s Decision, *supra* note 88, at 7 (quoting HETHERINGTON & KELLY, *supra* note 88, at 9).

93. *Id.* at 6–7; Robert D. Hess & Kathleen A. Camara, *Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children*, 35 J. SOC. ISSUES 79, 94 (1979). A statistically significant correlation exists between the duration of visits that children spent with their father and the quality of their relationship with the father. *Id.* There is, however, statistically significant correlation between the frequency of visitation. *Id.* Thus, the relationships between children and their fathers can be promoted and maintained even with variations in distance and frequency of visitation, as long as the quality of their visitation time was maintained. *See id.*

94. *See* Bruch, *supra* note 34, at 288–89. Bruch argues that moves that improve the custodial parent’s life often improve the quality of life for the child because a custodial parent’s good parenting abilities “is the most effective protection for a child’s post-divorce well-being” and that children’s adult opportunities are often “shaped by their mothers’ post-divorce financial circumstances.” *Id.* Some courts have also realized this. For example, in Arkansas, the court has found that “compelling job opportunities or the chance to finish an education provide a real advantage to the children and custodial parent.” *Hollandsworth v. Knyzewski*, 79 S.W.3d 856, 860 (Ark. Ct. App. 2002). Additionally, the court found that “the choice and opportunity to be a stay-at-home parent can be a compelling job opportunity providing a real advantage to the children . . . and that ‘psychological and emotional aspects of relocation can be as advantageous as economic or educational aspects.’” *Id.* (citing *Parker v. Parker*, 55 S.W.3d 773, 779 (Ark. 2001)).

95. Bruch, *supra* note 34, at 289 (citing HETHERINGTON & KELLY, *supra* note 88, at 88).

96. *See* Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, 46 U. KAN. L. REV. 433, 433 (1998); Brief Supporting Affirmance of Ct. App.’s Decision, at 9, *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004) (No. S107355); Bruch, *supra* note 34, at 291.

97. *See* Brief of Amici Curiae Supporting Affirmance of the Ct. App.’s Decision, *supra* note 88, at 9; Bowermaster, *supra* note 96 at 433; Bruch, *supra* note 34, at 291.

98. Brief of Amici Curiae Supporting Affirmance of the Ct. App.’s Decision, *supra* note 88, at 9–10 (citing Janet R. Johnston, *Research Update: Children’s Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 FAM. & CONCILIATION CTS. REV. 415, 420–21 (1995)).

may actually be better for the child because it may limit the child's exposure to his or her parents' negative interactions.<sup>99</sup> Certainly most, if not all, of the relocation cases that reach Missouri courts involve highly conflicted parents since a court does not even become involved in a parent's relocation unless the non-custodial parent objects to the relocation.<sup>100</sup>

Even though children's exposure to their parents' hostility and violence has serious emotional and psychological consequences, many states often prevent custodial parents from escaping abusive situations through relocation laws which contain no exceptions for custodial parents fleeing domestic violence.<sup>101</sup> As a result of relocation restrictions, a parent fleeing domestic violence may have her child taken away from her and transferred to the abusive parent.<sup>102</sup> Victims of domestic violence are likely overrepresented in relocation disputes.<sup>103</sup> In some relocation cases, domestic violence is a factor even when not alleged by the victim.<sup>104</sup>

99. See Jacqueline M. Valdespino, *Making the "Must Move" Case at Trial: Arguing that Relocation is Right for the Kids*, 28 FAM. ADVOC. 19, 22 (2006); Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY, 576, 583 (1989) (finding that where children of high-conflict parents had more frequent access to both parents and more frequent transitions between the parents, they were most likely to be clinically disturbed).

100. See Bowermaster, *supra* note 40, at 796–97.

101. Bowermaster, *supra* note 96, at 433. Missouri's relocation statute provides that in certain exceptional circumstances the notice requirements of the statute may be waived to protect the health and safety of a child or adults, and the the court may take remedial action it considers necessary to "considers necessary to facilitate the legitimate needs of the parties and the best interest of the child." MO. REV. STAT. § 452.377.4 (2008). It is not entirely clear, however, from the statute how a parent should proceed in seeking the court to waive the notice requirements. One interpretation would be that the parent would have to obtain a waiver from the court before relocating. It is not clear whether the court may grant a waiver of the notice requirements after the parent has already relocated for safety reasons. Even so, most parents would be wary of relocating first and seeking waiver of notice after the relocation. If the court does not agree that the parent's situation was an "exceptional circumstance," the parent may face a variety of civil and/or criminal sanctions for removing the child from the state, including the possibility that the court would transfer custody of the child to the abusive parent. See *Id.* § 452.377.12 (2008).

102. Bowermaster, *supra* note 96, at 433.

103. About one-half of all custody cases involve domestic violence, and domestic violence is frequently found in "high conflict" cases. Couples in high conflict cases are more likely to seek court intervention. As a result, Bowermaster hypothesizes that many relocation disputes that make themselves to court will involve domestic violence victims. Bowermaster, *supra* note 96, at 437.

104. See *id.* at 436 n.9. Attorneys may discourage clients from disclosing domestic violence in custody suits for fear that judges will be angered and believe the allegations of abuse were raised only to gain a tactical advantage. *Id.* (citing Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J.L. REFORM 65, 152–66 (1990); Merry Hofford et al., *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 217 (1995)).

Even without a history of domestic violence, conflict between a child's parents can be serious enough to cause psychological trauma to a child.<sup>105</sup> Generally speaking, children caught in the middle of high-conflict custody disputes are two-to-five times more likely to have clinical levels of psychological disturbance.<sup>106</sup> When joint custody arrangements are imposed on warring parents, they often maintain or increase conflict between the parents and hinder a child's development.<sup>107</sup>

Relocation restrictions are most often justified as intended to promote and maintain frequent and meaningful contact with both parents.<sup>108</sup> If that is the goal, however, relocation restrictions fail to provide the solution. As discussed in Part III, Section E, courts often "blackmail" custodial parents from relocating by threatening to change custody to the non-custodial parent if the custodial parent goes through with the relocation.<sup>109</sup> But if the court does not succeed in the "blackmail game" and the custodial parent moves her residence anyway—without the child—the custodial parent, the parent that until now has been the primary caretaker of the child, is now denied "frequent and continuing contact" with the child.<sup>110</sup> In such a scenario, the child now faces two types of difficult transitions—moving to a new residence and potentially a new town and school district to live with the non-custodial parent, and losing the day-to-day relationship with the custodial parent.<sup>111</sup>

At any rate, forcing parents to live near one another does not necessarily ensure that the child will be spared from emotional turmoil. Similarly, forcing parents to frequently communicate and share custody of their children does not increase the likelihood that they will cooperate with one another.<sup>112</sup> It is rare

105. E.g., Robert E. Emery, *Parental Alienation Syndrome: Proponents Bear the Burden of Proof*, 43 FAM. CT. REV. 8, 11–12 (2005); Frank F. Furstenberg, Jr. & Andrew J. Cherlin, *Divided Families: What Happens to Children When Parents Part*, in THE FAMILY IN PUBLIC POLICY at 106–7 (Frank F. Furstenberg, Jr. & Andrew J. Cherlin eds.) (1991); HETHERINGTON & KELLY, *supra* note 88, at 138; ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 284–85 (1992). See generally Bruch, *supra* note 34, at 291–92 (summarizing this research).

106. Janet R. Johnston et al., *The Psychological Functioning of Alienated Children in Custody Disputing Families: An Explanatory Study*, 23 AM. J. FORENSIC PSYCHOL. 39, 55 (2005); see also Bruch, *supra* note 34, at 291 n. 35 (critiquing Johnson's summary in Family Law Quarterly).

107. Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 278–79 (1987).

108. Wallerstein & Tanke, *supra* note 38, at 311.

109. Caroline Ritchie Heil, *Relocation Cases As Change in Custody Proceedings: "Judicial Blackmail," or Competing Interests Reconciled?*, 51 S.C. L. REV. 885, 896 (2000).

110. Bruch & Bowermaster, *supra* note 39, at 260.

111. Bruch, *supra* note 34, at 285.

112. Brief of Amici Curiae Supporting Affirmance of the Ct. App.'s Decision, *supra* note 88, at 8 (citing ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 183 (1992)).

for parents—even well-educated parents—to cooperate after a divorce.<sup>113</sup> Psychological studies show that even parents who manage to avoid conflict tend to do so by staying away from one another.<sup>114</sup> Overall, the very reasons that legislatures justify imposing relocation restrictions on custodial parents have been called into question by the psychological community, which begs the question: are relocation restrictions necessary at all to serve the best interests of the child?

### III. PROBLEM'S WITH MISSOURI'S RELOCATION LAW

#### A. *Burden of Proof*

Courts are often quick to reject legitimate relocation requests if they would complicate visitation with the non-custodial parent, often without considering the possibility of creating a revised custody schedule which would allow for longer, but less frequent visits.<sup>115</sup> In Missouri, and several other states,<sup>116</sup> the burden of proving that the relocation is in the child's best interests falls on the relocating parent,<sup>117</sup> usually the mother. If the mother does not convince the judge that moving is in the child's best interest, the judge will deny the relocation and order that if the mother ultimately moves, custody of the child will be transferred from the mother to the father.<sup>118</sup> If the mother "chooses" to stay, however, she may retain custody of the child.<sup>119</sup> One scholar opines that the state imposes on the mother the "cruellest [choice] of all," the threat of taking her children, and "imposing a Sophie's Choice of unconscionable proportions."<sup>120</sup> In these situations, the mother may be forced to litigate even if the father does not want custody or is not a suitable caretaker of the child.<sup>121</sup>

113. *Id.* In the Maccoby and Mnookin study, only 29% of Northern California parents, who were generally well-educated, cooperated in parenting post-divorce. *Id.* The custody evaluator in the landmark California relocation case *In re Marriage of LaMusga* has stated that, "[C]hildren of divorce rarely have parents who support each other." PHILIP M. STAHL, PARENTING AFTER DIVORCE: A GUIDE TO RESOLVING CONFLICTS AND MEETING YOUR CHILDREN'S NEEDS 46 (2000).

114. Brief of Amici Curiae Supporting Affirmance of the Ct. of Appeal's Decision, *supra* note 91, at 8 (citing ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 183 (1992)).

115. See Paige M. Dempsey, Casenote, *Joint Custody and Relocation: The Supreme Court of Nebraska Limits Relocation of Parents Sharing Joint Custody in Brown v. Brown*, 35 CREIGHTON L. REV. 185, 230–31 (2001), (criticizing a Nebraska court for failing to consider alternative visitation schedules before denying a relocation outright).

116. LaFrance, *supra* note 54, at 7.

117. MO. REV. STAT. § 452.377.9 (2008).

118. See LaFrance, *supra* note 54, at 9.

119. *Id.*

120. *Id.*

121. See Bruch, *supra* note 34, at 284 n.10.

Critics argue that the burden of proof falls on the wrong person in relocation disputes.<sup>122</sup> Many scholars contend that the custodial parent should have a presumptive right to move, absent a showing by the non-custodial father that the move is not in the child's best interests.<sup>123</sup> These critics argue that the mother should be allowed to rely on the trial court's initial custody order without fearing that a relocation request will trigger a re-evaluation of her parenting skills.<sup>124</sup> This notion underscores the common sentiment in child custody law that a custody placement should not be modified unless there is a substantial change in circumstances, to ensure that the child remains with its primary caretaker or "psychological parent."<sup>125</sup> By placing the burden of proof on the mother, mothers must overcome an enormous barrier in order to successfully move.

### B. *Practical Problems of Implementing the Law*

Missouri's law is also plagued by many practical problems which make it extremely difficult for custodial parents to successfully relocate if the move is contested.

#### 1. *Parents Seeking to Relocate Cannot Get a Court Date in Time*

Employers often need to make immediate personnel decisions and cannot hold employment offers indefinitely for parents who require months to provide statutory relocation notice and time to litigate the move.<sup>126</sup> For parents who have an immediate opportunity, a delayed trial date can, by default, prevent them from obtaining the opportunity (job, education, etc.) which triggered their request to relocate.<sup>127</sup> Non-custodial parents can use this as leverage to delay or even prevent the relocation.<sup>128</sup> Even where non-custodial parents have not caused the delay, the courts are often so backlogged that it is virtually impossible for a mother, given the minimum required statutory relocation

122. See LaFrance, *supra* note 54, at 10–11.

123. See, e.g., Wallerstein & Tanke, *supra* note 38, at 318; Bruch & Bowermaster, *supra* note 39, at 255.

124. See, e.g., Ann M. Driscoll, *In Search of a Standard: Resolving the Relocation Problem in New York*, 26 HOFSTRA L. REV. 175, 211 (1997).

125. See, e.g., Bruch & Bowermaster, *supra* note 39, at 247; Wallerstein & Tanke, *supra* note 39, at 318; see generally GOLDSTEIN ET AL., *supra* note 51, at 11–12, 19–27, 101–07 (1996) (describing the need for continuity between a child and their primary caregiver).

126. Glennon, *supra* note 38, at 136–37 (citing *Kaiser v. Kaiser*, 23 P.3d 278 (Okla. 2001)).

127. See Bowermaster, *supra* note 96, at 460 (explaining that abused parents often lose out on employment opportunities because they have a short time for accepting an employment offer (about thirty days) but often have to wait months for a relocation hearing).

128. *Id.* at 460.



notice (sixty days), to receive a trial court ruling before the day she was set to relocate.<sup>129</sup>

In virtually all cases, a significant trial delay can prejudice or inconvenience the custodial parent, but the situation becomes much more drastic in domestic violence situations. Janet Bowermaster tells a compelling story about Deb C., a victim of physical, sexual, and verbal abuse.<sup>130</sup> Deb's husband not only attacked her but also severely attacked police officers sent in to help Deb.<sup>131</sup> Deb's husband stalked, harassed, threatened, and attacked her in public and she feared for her life.<sup>132</sup> In all, it took over two and a half years after Deb filed for divorce before she was allowed to move away from her violent husband,<sup>133</sup> and she was told that if she relocated without court approval, she would be prosecuted under federal kidnapping laws and her husband would get custody of their son.<sup>134</sup> Such lengthy delays are not an aberration in relocation disputes. Several Missouri cases indicate a clear problem in receiving a timely hearing.<sup>135</sup> In one case, it took over a year after the custodial mother sent her relocation notice before the trial court heard the case.<sup>136</sup> It took another year before the appellate court rendered its decision.<sup>137</sup> Missouri needs to ensure parents seeking time-sensitive relocations that their cases will be quickly resolved.

## 2. Trial Courts Expect Relocating Parents to Produce Evidence at Trial Which is Impracticable or Impossible

Missouri's relocation statute requires parents to give notice of the proposed new address, if known.<sup>138</sup> Pragmatic parents realizing that the court may find relocation is not in the child's best interest and ultimately prevent the move will often not be able to provide an exact future address until after the

129. Consider Shelly Osia who gave seventy-six days notice of her relocation (sixteen days more than was required by law). Even with a relatively quick trial date, Shelly did not get a hearing until almost a month after she was slated to relocate. It took another month for the judge to issue his ruling. It took over another year before the appellate court rendered its decision. In all, the ordeal took about a year and a half to resolve. See Appellant's Brief at 5, *Osia v. Osia*, 260 S.W.3d 438, (Mo. Ct. App. 2008); *Osia v. Osia*, 260 S.W.3d 438, 438 (Mo. Ct. App. 2008).

130. See Bowermaster, *supra* note 96, at 433–35.

131. *Id.* at 433.

132. *Id.* at 433–34.

133. *Id.* at 435.

134. *Id.*

135. See, e.g., *Ratteree v. Will*, 258 S.W.3d 864, 865 (Mo. Ct. App. 2008); *Schlotman v. Costa*, 193 S.W.3d 430 (Mo. Ct. App. 2006).

136. *Johnston v. Dunham*, 172 S.W.3d 442, 442–45 (Mo. Ct. App. 2005). In *Johnston*, trial did not occur until over a year after the mother's relocation notice. *Id.* at 144. The appellate court issued a decision over two years after the request to relocate. *Id.* at 442.

137. *Id.*

138. See MO. REV. STAT. § 452.377.1 (2008).

relocation has been granted. Most parents lack the financial resources to buy a home or risk breaking a lease if the court refuses to allow them to relocate.<sup>139</sup> As a result, these parents will often list only the city on their relocation notice, with the idea that they will finalize their housing decision after they have permission to move.<sup>140</sup> Similarly, parents cannot accurately predict which school district or daycare their child will attend. For children attending public schools, the districts will be determined by the geographic area where the parent lives. For children who will be attending private school or daycare, many programs have limited openings and require a deposit to hold a child's slot. Many parents may not take the financial risk of paying for these programs unless they know their child will be certain to attend.

Yet courts have ignored these obvious realities. Courts will often find that a parent's move is not in the child's best interest if the mother cannot prove where they will be living, what the neighborhood is like, what school the child will attend, or how long their daily commute will be.<sup>141</sup> The result may be discrimination against relocating parents with low incomes. Wealthier individuals could perhaps afford to buy a new home or to break a lease on an apartment if they were not allowed to move. This option, however, may not be available for most litigants.

Likewise, courts usually refuse to grant a parent permission to relocate for employment if the employment offer is not concrete.<sup>142</sup> This ignores the

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139. Consider that Shelly Osia had already purchased a new home, and sold her old home while the relocation was pending. Appellant's Brief, *supra* note 2, at 10. After the trial court refused to allow her to move, she presumably had to find a new place to live. Certainly, many parents seeking relocation familiar with Shelly's plight would be wary of purchasing a new home or selling their current home until they had assurance that they could relocate.

140. See *Fohey v. Knickerbocker*, 130 S.W. 3d 730, 735 (Mo. Ct. App. 2004) (mother delayed housing decisions until the relocation was approved by the court).

141. See *id.*:

In addition to providing no evidence regarding Myranda's new home, mother also presented no evidence about Myranda's new neighborhood, nor what recreational opportunities would be available to Myranda in her new neighborhood. Mother explains that she was deferring such decisions until she had received court approval to relocate. While we can appreciate her position, it was mother's burden to show that the move was in Myranda's best interest. And thus, it would have behooved mother to provide the trial court with some evidence as to Myranda's proposed living environment.

See also *Wilson v. Wilson*, 873 S.W.2d 667, 670 (Mo. Ct. App. 1994) ("Mother provided no plan for living arrangements which would provide a stable environment for [child] in Rhode Island. That alone is sufficient to support the denial of mother's request to remove [child] to Rhode Island."); *Koenig v. Koenig*, 782 S.W.2d 86, 90 (Mo. Ct. App. 1989) (finding it was not in child's best interest to move with mother to New Hampshire to live with mother's new husband, noting that the mother provided little evidence about the proposed living arrangements); *Samuels v. Samuels*, 713 S.W.2d 865, 869-70 (Mo. Ct. App. 1986).

142. See, e.g., *Lowery v. Lowery*, 287 S.W.3d 693, 695-96 (Mo. Ct. App. 2009) ("Mother also did not have a job in Florida, but testified that she believed she could obtain employment at

reality that employers, familiar with the uphill battle relocating parents face, may refuse to give a firm offer of employment to parents who cannot relocate without the consent of the court or the other parent.<sup>143</sup> Courts should refrain from requiring parents to prove facts that they realistically cannot.

Sometimes other evidence produced at trial is of little value in determining whether a move is beneficial. For example, judges often hear evidence about the comparison of schools, parks, weather, and sometimes even factors such as crime rates and air quality.<sup>144</sup> In fact, one article targeted at family law practitioners advises them of the advantages of presenting evidence of better schools, a bigger home, less traffic, less crime, and better extracurricular activities through photographs or videos.<sup>145</sup> But things such as schools, parks, or crime rates are rarely the reason why the parent sought to move in the first place.<sup>146</sup> Nor are they usually the reasons for a non-custodial parent's objection to the move.<sup>147</sup>

As Janet Bowermaster points out, non-custodial parents do not contest relocations out of concern that their children will be living in a small town, or that their new school will have fewer academic choices, or there are fewer cultural opportunities for the child to experience,<sup>148</sup> although non-custodial parents often raise such issues in relocation litigation. Such evidence is not useful and requires parents to do nothing more than play to the judge's personal preferences.<sup>149</sup> If judges were forced to decide all cases based on superfluous evidence, they would presumably allow every move to Maine,

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the Publix grocery store where she had worked previously.”); *Buck v. Buck*, 279 S.W.3d 547, 551 (Mo. Ct. App. 2009) (acknowledging the move would improve quality of the mother's home and found that the general quality of the mother or children's lives would be improved because the mother lacked employment); *Vaughn v. Bowman*, 209 S.W.3d 509, 513 (Mo. Ct. App. 2006) (affirming the move was not in the child's best interest where the step-father may be required to move for a position at the fire department, but at the time of trial, no position was available); *Samuels v. Samuels*, 713 S.W.2d 865, 869–70 (Mo. Ct. App. 1986) (criticizing the mother's plans as “too speculative” and noting that she didn't “have a definite job”).

143. Glennon, *supra* note 38, at 136 (citing *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005) (finding that the employer was unwilling to make offer until parent stated intent to relocate)).

144. Duggan, *supra* note 44, at 199.

145. See Valdespino, *supra* note 99, at 20–24.

146. Duggan, *supra* note 44, at 198.

147. Bowermaster, *supra* note 40, at 799; Bruch, *supra* note 34, at 282. Bruch notes that the usual reasons for objections to relocation are fears that less time with the child or less frequent interactions with the child will weaken the parent-child relationship and concerns about the quality of the custodial parent's caretaking skills. *Id.* More nebulous reasons such as the potential inconvenience and cost of travel for visitation, or an attempt to control or battle with the custodial parent provide additional reasons for resisting relocation. *Id.*

148. Bowermaster, *supra* note 40, at 799.

149. Duggan, *supra* note 44, at 199.

considered the most child-healthy state, and reject every move to Mississippi, the most child-unhealthy state.<sup>150</sup>

Courts should create evidentiary rules to exclude such statistical evidence unless the parties can link it to *actual* child improvement or diminishment. For example, the same evidence may be admissible if, say, there had been a rash of violent crimes within the neighborhood where the child will reside, if moving to a new city with air pollution problems would exacerbate a child's medical condition, or if evidence showed that changing school districts would offer more resources to assist a child's unique educational needs.<sup>151</sup>

Creating evidentiary standards which limit the introduction of these problematic types of evidence would be helpful in ensuring that family court judges decide a case based on its actual merits rather than illusory "crime rates" or the implication that a relocating parent has not diligently prepared for the move because she cannot provide an exact address.

### 3. Relocation Decisions Evade Meaningful Review

Another important factor, which propounds the errors of the trial court, is that relocation decisions often evade meaningful appellate review.<sup>152</sup> Often by the time a case has reached an appellate court, the litigant has abandoned the very opportunity that created her request to relocate.<sup>153</sup> Moreover, it is often prohibitively expensive to appeal child custody cases. Parents who are financially struggling, or seeking to relocate for economic reasons, usually mothers, are often prevented from appealing decisions that they believe are erroneous.<sup>154</sup>

150. *Id.* (citing THE ANNIE E. CASEY FOUNDATION, KIDS COUNT (2006), available at <http://www.aecf.org/kidscount/>).

151. For example, in *Osia*, evidence showing that the new school district had programs to better accommodate the *Osia* sons' learning disabilities should be admissible because it is not a statistical composite of information, but rather, information directly affecting the children's needs. Appellant's Brief, *supra* note 2, at 9.

152. Glennon, *supra* note 38, at 136 ("[C]ases that reach an appellate decision are most likely only a small percentage of custodial parents who want to relocate but who are unable to effectuate their choice."); Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHI.-KENT L. REV. 345, 351 (1993).

153. See *supra* notes 157–60 and accompanying text.

154. Glennon, *supra* note 38, at 137 ("The expense custodial parents must assume in order to litigate their right to relocate may also prevent parents from seeking judicial permission to relocate."). The Missouri Task Force on Gender and Justice reported tremendous problems in family law regarding financial impediment to the courts. Missouri Task Force on Gender & Justice, *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 528–29 (1993). Although the Task Force published its results in 1993, little has changed in the family court system, and no other task force has been created to investigate the problems. *Id.* The Task Force found that the "lack of financial resources [is] a serious problem in access to the courts in family law matters" and that litigants, most often women, yield on promising claims because of lack of financial resources. *Id.* A former chairman of the Missouri Bar Family Law Section

Appellate courts themselves cannot settle on a uniform method to evaluate trial court errors in relocation cases and often create a hodge-podge of appellate decisions which reflect no apparent rule governing relocation. For example, in *Osia v. Osia*, the appellate court refused to reverse a trial court's ruling that a mother could not move thirty-four miles away from her previous residence, even though the father's objections to the relocation were tenuous at best.<sup>155</sup> But in *In re Marriage of Williams*, handed down a year earlier, the appellate court *reversed* the decision of the trial court denying mother's motion to relocate.<sup>156</sup> The appellate court reasoned that the distance was *only* fifty-five miles away and that it would be unrealistic to inflexibly confine her to a geographic area, even though the move was across state lines.<sup>157</sup> Certainly if dissolution and child custody cases reveal the "greatest opportunity to observe and judge the fairness of our courts' operations," then these inconsistent and biased rulings show that our courts are failing in its "institutional obligation to ensure litigants fair and effective access to the courts and to render decisions grounded in economic and psychological realities of the family unit . . . ."<sup>158</sup>

Finally, the standard of appellate review is often very high—in most states, it is "abuse of discretion."<sup>159</sup> The high level of deference to trial court decisions has been criticized as encouraging "inconsistency and arbitrariness" in relocation cases.<sup>160</sup> Because a "best interest" determination necessarily involves a very subjective evaluation by the trial judge and a weighing of the credibility of the parties, most appellate courts lack a meaningful way of determining whether the trial court committed error.<sup>161</sup> Discouraged by this high standard of proof, very few litigants appeal their child custody and relocation cases.<sup>162</sup>

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testified that economic control can often be determinative of who will succeed in family law cases. *Id.* One attorney remarked, "How many clients can afford \$5,000.00, \$10,000.00 to appeal a case?" *Id.* at 539–40.

155. See *Osia*, 260 S.W.3d at 438; Appellant's Brief at 7, *Osia v. Osia*, 260 S.W.3d 438, (Mo. Ct. App. 2008); see *supra* notes and accompanying text 26–29 discussing the father's objections to the relocation.

156. *In re Marriage of Williams*, 220 S.W.3d 858, 861 (Mo. Ct. App. 2007).

157. *Id.*

158. Task Force on Gender & Justice, *supra* note 154, at 527.

159. See Law & Hennessey, *supra* note 152, at 351; Hon. Arline S. Rotman et. al., *Reconciling Parents' and Children's Interests in Relocation: In Whose Best Interests?*, 38 FAM. & CONCILIATION CTS. REV. 341, 364–65 (2000); Task Force on Gender and Justice, *supra* note 154, at 540.

160. LaFrance, *supra* note 54, at 57–58.

161. Law & Hennessey, *supra* note 152, at 350–51; see *infra* notes 173–82 and accompanying text.

162. Law & Hennessey, *supra* note 152, at 351; see also LaFrance, *supra* note 54, at 57–58 (stating the appellate deference discourages "the very appeals which might rationalize outcomes").

### C. *Best Interest Standards*

Missouri appellate court decisions regarding relocation lack a consistent rule to confirm or deny locations.<sup>163</sup> Even decisions within one appellate district often contradict each other.<sup>164</sup> The result is that the outcome of a custodial parent's relocation request may largely depend on the appellate district in which the custodial parent resides.<sup>165</sup> One author criticizing Missouri's scheme opined: "If the only predictability in the system is the fact that one division will more likely grant relocation than another, the state has failed to enact a statutory and judicial decision-making scheme that is just and supportive of the new family unit."<sup>166</sup> Missouri is not the only state whose relocation law lacks consistency and uniformity. Nationally, there is no uniform approach to how states deal with relocation disputes, leading to confusion and unpredictability regarding how courts will rule on any given issue.<sup>167</sup>

Part of the problem underscoring the lack of uniformity is the standard used to decide relocation disputes. Missouri, like every other jurisdiction deciding relocation disputes, uses the "best interests of the child" to make relocation decisions.<sup>168</sup> Professor Bowermaster, noting the irony that every jurisdiction uses the same test with widely divergent outcomes, argues that the test can serve no real purpose as a decisional guideline.<sup>169</sup> Statutes governing relocation often list factors courts should consider when determining the best interests of the child, including age, special needs, and the health of the parties

163. Ford, *supra* note 69, at 35. *Compare* *Osia v. Osia*, 260 S.W.3d 438, 438 (Mo. Ct. App. 2008) (denying relocation 25 miles away) with *In re Williams*, 220 S.W.3d 858, 861 (Mo. Ct. App. 2007) (overturning trial court's decision to refuse relocation when mother was only seeking to move 55 miles away since "relocation would [not] prohibit Father from continuing his active role in the child's life.") with *Kell v. Kell*, 53 S.W.3d 203, 207 (Mo. Ct. App. 2001) (finding that a mother's move from Missouri to Florida was in the child's best interest).

164. Ford, *supra* note 69, at 36–40.

165. *Id.* at 40.

166. *Id.*

167. See, e.g., Amie J. Tracia, *Navigating the Waters of Massachusetts Child Relocation Law: Assessing the Application of the Real Advantage Standard*, 13 SUFFOLK J. TRIAL & APP. ADVOC. 139, 141 (2008); *Baures v. Lewis*, 770 A.2d 214, 217 (N.J. 2001); *Tropea v. Tropea*, 665 N.E.2d 145, 149 (N.Y. 1996) (criticizing previous relocation regime as "difficult to apply"); Ford, *supra* note 69, at 19 (noting that open-ended best interest analyses have led to a lack of uniformity and reliability in many courts); *Gruber v. Gruber*, 583 A.2d 434, 437 (Pa. Super. Ct. 1990) ("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. . . . Across the country, applicable standards remain distressingly disparate."); *Hollandsworth v. Knyzewski*, 79 S.W.3d 856, 863 (Ark. Ct. App. 2002).

168. Bowermaster, *supra* note 40, at 799.

169. *Id.*

and children.<sup>170</sup> But most statutes do not prioritize the factors<sup>171</sup> and may allow the court to consider any other factor that the court deems relevant.<sup>172</sup>

The standard creates an Orwellian scenario in which every decision of the custodial parent is examined under a microscope.<sup>173</sup> The judge and the non-custodial parent serve as Big Brother, examining every large and small choice the custodial parent, usually the mother, makes. As discussed in Part III, Section D, such intrusion into private family life implicates constitutional concerns.

The best interests standard gives judges extremely broad discretion,<sup>174</sup> so much so that the test has been called “a euphemism for unbridled judicial discretion”<sup>175</sup> and “a vague platitude [rather] than a legal or scientific standard” that is subject to abuse by judges who use it to further their own interests.<sup>176</sup> Many commentators have half-seriously suggested that when both parents are fit caretakers, it is likely to be just as accurate to flip a coin to decide custody than it is to use vague and ambiguous “best interest” standards.<sup>177</sup>

This vagueness allows divorce courts to “pay lip-service” to the standard as a way of masking bias.<sup>178</sup>

Judges, too, express discomfort using the best interests test.<sup>179</sup> For example, Judge Gary Crippen has attacked the doctrine on grounds that it

170. Charlow, *supra* note 107, at 268.

171. *Id.*

172. MO. REV. STAT. § 452.375 (2000) (specifying various factors to consider but not limiting courts analysis to those factors.)

173. LaFrance, *supra* note 54, at 136 (quoting Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 816–17 (1985)).

174. See, e.g., Rotman et al., *supra* note 159, at 364–65; Ford, *supra* note 69, at 3.

175. Charlow, *supra* note 107, at 269.

176. *Id.* at 267; Katherine C. Sheehan, *Post-Divorce Child Custody and Family Relocation*, 9 HARV. WOMEN’S L.J. 135, 138 (1986) (calling the best interests test “intrusive, unworkable, and indeterminate”).

177. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 257–62 (1975); JOSEPH GOLDSTEIN ET. AL., BEYOND THE BEST INTERESTS OF THE CHILD 153 n.12 (1973); Duggan, *supra* note 44, at 193 (suggesting that playing rock, paper, scissors to determine relocation cases is likely to be just as accurate as using traditional vague best interest factors).

178. Alexandra Selfridge, *Equal Protection and Gender Preference in Divorce Contests Over Custody*, 16 J. CONTEMP. LEGAL ISSUES 165, 170–71 (2007); Law & Hennessey, *supra* note 153, at 350–51. See also Rotman et al., *supra* note 160, at 364 (arguing that judges use their own experiences when considering the child’s best interests and explaining that “[e]very judge, no matter how conscientious, brings his or her particular point of view into the courtroom” which makes the best interest standard very subjective); Charlow, *supra* note 107, at 262 (arguing the standard is marred by personal and cultural bias).

179. Charlow, *supra* note 107, at 269, 270 (citing Charnas, *Practice Trends in Divorce Related Child Custody*, 4 J. DIVORCE 57 (1981)); Eleanor E. Maccoby, Editorial, *A Cogent Case for a New Child Custody Standard*, 6 PSYCHOL. SCI. PUB. INT. i, i (2005) (“Judges . . . [find] it well-nigh impossible to determine which of two contesting parents can best support the children’s

“risks unwise results, stimulates litigation, permits manipulation and abuse, and allows a level of judicial discretion that is difficult to reconcile with an historic commitment to the rule of law.”<sup>180</sup>

Overall, the best interest of the child analysis creates an “exhaustive, intrusive, and expensive investigation of [one’s life] and plans.”<sup>181</sup> The test encourages litigation: since neither side can predict the outcome, parties overestimate their chance of success and are more willing to litigate.<sup>182</sup> By implication, the increased likelihood of litigation also increases the price tag of the legal bill.<sup>183</sup> On the other hand, parties may likewise agree to “bad” settlements rather than risk uncertain results in litigation.<sup>184</sup> Missouri lacks a test that limits the scope of judicial inquiry while adequately weighing a child’s interests.

#### D. Constitutional Problems

Missouri’s relocation law is vulnerable to many constitutional attacks—among them, the right to travel, the right to marry, and the right to family privacy. Consider the story of Cynthia Buchheit as an example of constitutional issues at stake in Missouri’s relocation law.<sup>185</sup> In 2006, after a contentious divorce and modification, Ms. Buchheit notified her ex-husband, Ricardo Berkbigler, of her intent to relocate with the couple’s child.<sup>186</sup> The relocation notice sent by Ms. Buchheit came after a contentious modification

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long-term well-being.”); Task Force on Gender and Justice, *supra* note 154, at 539 (explaining that Missouri judges often feel discomfort in making decisions on private family matters and feel difficultly deciding cases when there is “no clear legal solution”).

180. Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota’s Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 499–500 (1990) (internal citation omitted); *see also* Robert Pfenning, Note and Comment, *The Best Interests of the Child: Do the Courts’ Subjective Factors in Determining “Best Interests” Really Benefit the Child?*, 17 J. JUV. L. 117, 128 (1996) (arguing that judges manipulate statutory factors to interject their personal biases in a way that is unlikely to be reversed on appeal).

181. Sheehan, *supra* note 176, at 137.

182. Charlow, *supra* note 107, at 270; *see also* Ford, *supra* note 69, at 2–4 (recalling a case where the state’s relocation law afforded judges significant discretion, and choosing the litigation strategy was difficult because of the uncertain consequences of seeking court permission to relocate); Maccoby, *supra* note 179, at i.

183. Duggan, *supra* note 44, at 194–95; *see id.* at 197 (arguing that the money spent in relocation disputes violates a cardinal rule of economics—that it is not worth proceeding when marginal costs exceed marginal gains).

184. Charlow, *supra* note 107, at 273; *See e.g.* Ford, *supra* note 69, at 4–5 (noting that the unpredictable outcome puts women at a weaker negotiating position, and increases the likelihood that women will make concessions they otherwise would not make in order to move).

185. Brief for Appellant at 2–4, *Buchheit v. Berkbigler*, No. 89113 (Mo. Ct. App. E.D. Sept. 17, 2007), 2007 WL 3054639.

186. *Id.*



proceeding, less than a year after the divorce, in which Ms. Buchheit was granted sole legal custody of the minor child because the parties could not communicate with one another.<sup>187</sup>

Ms. Buchheit's proposed relocation would have taken her from her parent's home in Perryville, Missouri to Festus, Missouri, a distance of roughly forty-two miles.<sup>188</sup> Ms. Buchheit's proposed relocation was prompted by her recent engagement to her fiancé, Mr. Courtway, who lived and worked near Festus, her desire to move out of her parents' home, and her need to be able to cohabitate with her new spouse upon remarriage.<sup>189</sup>

Ms. Buchheit's relocation was opposed by her ex-husband, Mr. Berkbighler.<sup>190</sup> The trial court, in reliance on the statutory factors in section 452.377, held that Ms. Buchheit's proposed relocation of forty-two miles would "have a significant impact on [Mr. Berkbighler's] ability to maintain his weekday visitations" and would be "logistically impractical" for Mr. Berkbighler.<sup>191</sup> The trial court also, not once, but three times, maintained that the move was not in the best interest of the child because the move would "limit the child's ability to regularly care for and play with his multiple pets at his father's home," and that the child's "ability to enjoy his pets would be diminished considerably by the loss of the mid-week visitation period."<sup>192</sup> Additionally, the trial court was unconvinced that "the quality of education in the Festus school district . . . would be any better than the education the child [was] receiving" at his current school.<sup>193</sup> Consequently, the trial court denied Ms. Buchheit's relocation.<sup>194</sup> The denial was affirmed by the Missouri Court of Appeals Eastern District in an unpublished memorandum opinion.<sup>195</sup>

### 1. Right to Travel

There is, perhaps, no more eloquent way to illustrate one's constitutional right to travel than the words penned by Justice Jackson in *Edwards v. California*.<sup>196</sup>

187. *Id.* at \*3.

188. *Id.*

189. Brief for Appellant at 2–3, 6–7, *Buchheit v. Berkbighler*, No. 89113 (Mo. Ct. App. E.D. Sept. 17, 2007), 2007 WL 3054639; Reply Brief for Appellant at 5, *Buchheit v. Berkbighler*, No. 89113 (Mo. Ct. App. E.D. Sept. 17, 2007), 2007 WL 4623414.

190. Brief for Respondent at 5, *Buchheit v. Berkbighler*, No. 89113 (Mo. Ct. App. E.D. Oct. 16, 2007), 2007 WL 3249950.

191. *Buchheit v. Berkbighler*, No. 04PR–CV00345–01, at 2–3 (Mo. Cir. Ct. Perry County, Nov. 16, 2006) (judgment denying petitioner's request to relocate with the child).

192. *Id.* at 3–4.

193. *Id.*

194. *Id.* at 6.

195. *Buchheit v. Berkbighler*, No. 89113, slip op. at 5 (Mo. Ct. App. 2008).

196. 314 U.S. 160 (1941).

This Court should . . . hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.<sup>197</sup>

The Supreme Court has repeatedly held that citizens have a constitutional right to travel and migrate within the United States.<sup>198</sup> As Justice Stewart stated, this right is “not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards . . . . [I]t is a virtually unconditional personal right.”<sup>199</sup> The right to travel has been defined as guaranteed by the privileges and immunities clause.<sup>200</sup> Some have viewed this right as stemming from a liberty interest guaranteed by the Fourteenth Amendment.<sup>201</sup> “[O]ur constitutional concepts of personal liberty . . . require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”<sup>202</sup> Others have viewed the right to travel through the lens of the commerce clause.<sup>203</sup> The importance and recognition of an individual’s right to travel predates even our own Constitution, as this right was recognized explicitly in the Articles of Confederation.<sup>204</sup> While many courts have overlooked this important right in relocation cases and statutes, the right to travel is one firmly engrained in our nation’s history and culture.<sup>205</sup>

Missouri’s relocation law infringes upon a custodial parent’s right to travel because it restricts the parent’s movement within a geographical area if the

197. *Id.* at 183 (Jackson, J., concurring).

198. *See, e.g.,* *Shapiro v. Thompson*, 394 U.S. 618, 642–43 (1969) (Stewart, J., concurring) (“The constitutional right to travel from one State to another . . . has been firmly established and repeatedly recognized.” (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966))).

199. *Id.* (emphasis omitted) (citation omitted).

200. *Edwards*, 314 U.S. at 183 (Jackson, J., concurring).

201. U.S. CONST. amend. XIV, § 2, cl. 2 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

202. *Shapiro*, 394 U.S. at 629.

203. U.S. CONST. art. I, § 8, cl. 2 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); *see Edwards*, 314 U.S. at 166.

204. ARTICLES OF CONFEDERATION art. IV, § 1; *see also* *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan, J., concurring) (holding that the “unmistakable essence” of the right to travel is found in the “document that transformed a loose confederation of States into one Nation”).

205. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1379 (2d ed. 1998) (“[The right to travel] relates as much to the importance of lifting all artificial barriers to personal mobility as to the virtues of an integrated national economy and society.”) (internal citation omitted).

parent wishes to retain custody of her child. A law which prohibits or burdens a person's fundamental right to travel demands strict scrutiny.<sup>206</sup> Additionally, if a law serves no other purpose "than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then [the law] [is] patently unconstitutional."<sup>207</sup> Missouri's relocation law certainly qualifies as one which "unduly burdens" an individual's right to travel and may, in effect, serve no other purpose than to "chill the assertion" of that very right.

Whether Missouri's relocation law can withstand strict scrutiny requires an examination of the compelling state interests being asserted by the state. Certainly, Missouri would assert that it has a compelling interest in ensuring the well-being of Missouri's children and that such responsibility is reserved to the management of the states.<sup>208</sup>

In Missouri, the state's responsibility over children's "welfare" has essentially been incorporated into the relocation statute as a judicial determination of whatever the court decides is in the child's "best interest."<sup>209</sup> As discussed previously, however, this standard is so vague and nebulous as to amount to little more than a mere "euphemism for unbridled judicial discretion."<sup>210</sup>

A good example of this can be found in *Buchheit v. Berkbighler*,<sup>211</sup> the case referenced at the beginning of this section. In *Berkbighler*, the trial court relied heavily on the child's menagerie of animals at his father's house as a seemingly important factor in determining what it considered to be in the child's best interest, holding that midweek visitation was important for the minor child to cultivate his relationship with his pets.<sup>212</sup> Decisions such as the one in *Berkbighler* illustrate why the "best interest" standard is not definite or narrowly tailored enough to meet strict scrutiny: even if the child were in fact happier taking more frequent care of his animals, this would still not justify the curtailment of Ms. Buchheit's fundamental right to travel.

206. Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 904-05 (1986).

207. *Shapiro*, 394 U.S. at 631 (quoting *United States v. Jackson*, 390 U.S. 570, 581 (1968)).

208. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); see *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens.").

209. MO. REV. STAT. § 452.377.8 (West 2000).

210. Charlow, *supra* note 107, at 269.

211. No. 04PR-CV00345-01, at 5 (Mo. Cir. Ct. Perry County, Nov. 16, 2006) (judgment denying petitioner's request to relocate with the child); see *supra* notes 211-21 and accompanying text.

212. *Buchheit v. Berkbighler*, No. 04PR-CV00345-01, at 3-4 (Mo. Cir. Ct. Perry County, Nov. 16, 2006) (judgment denying petitioner's request to relocate with the child); see also *Miers v. Miers*, 53 S.W.3d 592, 598 (Mo. Ct. App. 2001) (holding that child could maintain meaningful relationship with half-siblings only during weekend, holiday, and summer visitation with mother).

Further, in assessing the mother's proposed move of merely forty-two miles, the court surely could have utilized less intrusive means to promote frequent and meaningful contact between father and child than by denying the mother the right to relocate her place of residence.<sup>213</sup> The conflict between the mother's fundamental right to travel and the father's right to frequent and meaningful contact with his son was illusory. If, as the trial court said, midweek visitation would no longer be possible, extended time over weekends or holidays could have been procured for father in order to compensate for any lost time. Transportation costs could have easily been reallocated to offset any increase in expenses suffered by father as the result of mother's move. The court did not use the least intrusive means at its disposal to balance these competing interests because it determined that by acting under the guise of the child's "best interests" it was not obligated to mitigate the harm to the rights of either party. Placing the burden on a relocating parent to show that the relocation is in her child's best interests impermissibly burdens the free exercise of that parent's constitutional rights, and several state supreme courts have recently reached this same conclusion.<sup>214</sup> In *Jaramillo v. Jaramillo*,<sup>215</sup> the New Mexico Supreme Court, in overturning a lower court's decision to bar a mother from relocating, held that "placing [a] burden on the relocating parent and favoring the resisting parent with a corresponding presumption that relocation is not in the child's best interest unconstitutionally impairs the relocating parent's right to travel."<sup>216</sup> Such a burden of proof would require the custodial parent to "prove she has a right to exercise her rights."<sup>217</sup>

The Wyoming Supreme Court, in *Watt v. Watt*,<sup>218</sup> also affirmed that a burden placed upon the right to travel by that state's relocation statute was unconstitutionally permissible:

The right of travel enjoyed by a citizen carries with it the right of a custodial parent to have the children move with that parent. This right is not to be denied, impaired, or disparaged unless clear evidence before the court . . . establishes the detrimental effect of the move upon the children.<sup>219</sup>

213. *Buchheit v. Berkgigler*, No. 04PR-CV00345-01, at 6 (Mo. Cir. Ct. Perry County, Nov. 16, 2006) (denying petitioner's request to relocate with the child).

214. *See, e.g., In re Marriage of Ciesluk*, 113 P.3d 135, 146 (Colo. 2005); *Jaramillo v. Jaramillo*, 823 P.2d 299, 305 (N.M. 1992); *Watt v. Watt*, 971 P.2d 608, 615-16 (Wyo. 1999).

215. 823 P.2d 299 (N.M. 1992).

216. *Id.* at 305.

217. Arthur LaFrance, *supra* note 54, at 1, 1; *see Jaramillo*, 823 P.2d at 305; Duggan, *supra* note 44, at 198.

218. 971 P.2d 608 (Wyo. 1999).

219. *Id.* at 615-16; *see also In re Marriage of Ciesluk*, 113 P.3d 135, 142 (Colo. 2005) ("[T]hough [the relocation law] does not prohibit outright a majority time parent from relocating, it chills the exercise of that parent's right to travel because, in seeking to relocate, that parent risks losing majority parent status with respect to the minor child.").

Additionally, the court noted that while “a ‘father’s change in visitation due to mother’s relocation is unfortunate, [it is] not an unusual result of divorce,’” and that “‘the advantages of the move [should not] be sacrificed . . . solely to maintain weekly visitation by the father where reasonable alternative visitation is available . . . .”<sup>220</sup> Addressing the issue of intrastate application of the constitutional right to travel, the court held that it would be “incongruous” for these constitutional liberties to apply only to situations involving interstate travel and not to apply equally to travel conducted wholly intrastate.<sup>221</sup>

As Professor Brigitte Bodenheimer, known for her drafting of the Uniform Child Custody Jurisdiction Act (UCCJA), argued as early as 1977, punitive orders that require custodial parents to give up custody of their children in order to exercise their right to travel are unconstitutional penalties and were unenforceable under the UCCJA.<sup>222</sup> Over thirty years ago she argued that “it is a safe prophesy that the right-to-move issue in this context is a constitutional question whose time has come or is overdue.”<sup>223</sup> She stressed that:

Impediments on changes of residence held unconstitutional [by the U.S. Supreme Court in *Dunn* and *Shapiro*] are minimal in comparison with the restraints placed on parents [who seek to relocate with their children]. Imposing the condition of leaving the children behind places the most direct and oppressive burden on the exercise of constitutional freedom one can imagine.<sup>224</sup>

A court or statute that prohibits a relocating parent’s right to travel, when other alternatives for frequent and meaningful visitation exist for the non-relocating parent, does not act in a manner narrowly tailored to meet the state’s interests.<sup>225</sup> There is no compelling state interest that would demand an

220. *Watt*, 971 P.2d at 614 (citing *Love v. Love*, 851 P.2d 1283, 1289 (Wyo. 1993)).

221. *Id.* at 615 (citing *King New Rochelle Mun. Hous. Auth.* 442 F.2d 646, 648 (2d Cir. 1971)).

222. Brigitte Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modifications*, 65 CAL. L. REV. 978, 1008–09 (1977).

223. *Id.* at 1009.

224. *Id.* (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969)).

225. LaFrance, *supra* note 54, at 77; See *id.* at 77–78 where LaFrance argues the only compelling state interest is endangerment, since there are reasonable alternatives available to protect the father’s interests; see also, *In re Sheley*, 895 P.2d 850 (Wash. Ct. App. 1995), *overruled on other grounds by In re Marriage of Littlefield*, 940 P.2d 1362 (Wash. 1997) (finding that the constitutional right to travel requires that the burden be placed on the noncustodial parent who is opposing the move); the *Sheley* court further states:

[T]he nonresidential parent who wishes the court to restrict the residential parent’s right to relocate with the child has the burden of proving more than simply that the restriction will serve the best interests of the child. He or she must also prove that the proposed relocation would be detrimental to the child in some specific way that is not inherent in

identical degree of visitation to what was in place before relocation, but rather, the state's interest is satisfied when the parties, or a court, can produce a viable alternative.<sup>226</sup>

Moreover, Missouri law appears to give no consideration to the ability of the father to move and follow the mother. Accordingly, the law is likely overinclusive in allowing courts to prevent the relocation of the mother when the father himself could, but chooses not to, relocate with the mother if he wanted to stay in close proximity to the child.<sup>227</sup>

Perhaps such a move would be unrealistic because of the father's job or family commitments, but it is often no more unrealistic than the commitments that the mother is required to give up in order to maintain custody of her child.<sup>228</sup> Preventing a mother's relocation without considering the father's ability to follow essentially forces the mother to give up her constitutional rights to travel because the father chooses not to exercise his.

## 2. Right to Privacy and Right to Raise Children

Courts have long held that there is a "private realm of family life which the state cannot enter."<sup>229</sup> Beginning in the early 1920s in *Meyer v. Nebraska*<sup>230</sup> and *Pierce v. Society of Sisters*,<sup>231</sup> the Supreme Court has recognized a right of family privacy.<sup>232</sup> Almost twenty years later, in *Prince v. Massachusetts*, the Supreme Court read *Meyer* and *Pierce* as giving parents a fundamental due process right to determine the upbringing of their children,<sup>233</sup> consistent with the *Pierce* holding that children "[are] not the mere creature[s] of the state;

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the geographical distance between the parents if the move is approved. As Sheley points out, all change is disruptive, and a simple balancing of the status quo against the unknowns of the new location, particularly in light of the disruption already attendant to the separation and divorce, is likely to result in the undue sacrifice of the constitutional right to travel, often to the detriment of women, many of whom are financially devastated by divorce and, more often than men, in need of the opportunity to make a new economic start.

*Sheley*, 895 P.2d at 850.

226. *See, e.g.*, *Baures v. Lewis*, 770 A.2d 214, 227 (N.J. 2001) ("[I]t is not any effect on visitation, but an adverse effect that is pivotal. An adverse effect is not a mere change or even a lessening of visitation; it is a change in visitation that will not allow the non-custodial parent to maintain his or her relationship with the child.") (citation omitted).

227. Other states have required such an inquiry. *Rampolla v. Rampolla*, 635 A.2d 539, 543–44 (N.J. Super. Ct. App. Div. 1993).

228. The most frequent type of commitments a mother may have to give up include employment opportunities, educational opportunities, ability to live near family, and remarriage. *See supra* note 35 and accompanying text.

229. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

230. 262 U.S. 390 (1923).

231. 268 U.S. 510 (1925).

232. *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 399.

233. *Prince*, 321 U.S. at 166.

those who nurture [them] and direct [their] destin[ies] have the right, coupled with the high duty, to recognize and prepare [them] for additional obligations.”<sup>234</sup> This right of parents to choose how to raise their children is grounded in the Due Process clauses of the Fifth and Fourteenth Amendments and in an individual’s right to privacy.<sup>235</sup>

Courts have held that the new family unit(s) created by divorce are entitled to the same amount of family privacy regarding their decisions as the intact family would have been given.<sup>236</sup>

Accordingly, it is presumed that fit parents, married or divorced, act with the best interests of their children at heart.<sup>237</sup> The mere fact that a court would make a different choice than a fit parent with regard to a child’s upbringing (whether that decision touches upon where a child should reside, what activities she should participate in, etc.) does not grant the court authority to take that decision-making power away from a parent; in other words, “[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.”<sup>238</sup>

Missouri courts undertake the Orwellian inquiry into whether the move should be allowed even in cases where the mother seeking to relocate has sole legal custody, or in other words, sole decision-making power over the child’s upbringing.<sup>239</sup> For example, in *Berkbigler*, the court gave no credence to the fact that Ms. Berkbigler had recently been awarded sole decision-making

234. See *Pierce*, 268 U.S. at 534–35.

235. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (stating the Fourteenth Amendment affords constitutional protection to personal decisions, including marriage, family relationships, child rearing, and education); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 842–43 (1977) (stating the Fourteenth Amendment protects personal choice in matters of family life); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (“[F]reedom of personal choice . . . in family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (citing *Pierce*, 268 U.S. 510 (1925)).

236. *Mize v. Mize*, 621 So. 2d 417, 419 (Fla. 1993); *Day v. LeBlanc*, 610 So. 2d 42, 44 (Fla. Dist. Ct. App. 1993); *Hill v. Hill*, 548 So. 2d 705, 707 (Fla. Dist. Ct. App. 1989); *Osteraas v. Osteraas*, 859 P.2d 948, 951 (Idaho 1993); *In re Marriage of Branham*, 617 N.E.2d 1317, 1322 (Ill. App. Ct. 1993); *In re Marriage of Pribble*, 607 N.E.2d 349 (Ill. App. Ct. 1993); *In re Marriage of Zamarripa-Gesundheit*, 529 N.E.2d 780, 783 (Ill. App. Ct. 1988); *Smith v. Smith*, 615 So. 2d 926, 930–31 (La. Ct. App. 1993); *Hemphill v. Hemphill*, 572 N.Y.S.2d 689, 693 (N.Y. App. Div. 1991); *Dobos v. Dobos*, 431 S.E.2d 861, 863 (N.C. 1993); *Fortin v. Fortin*, 500 N.W.2d 229, 231 (S.D. 1993); *Taylor v. Taylor*, 849 S.W.2d 319, 332 (Tenn. 1993); *Lane v. Schenck*, 614 A.2d 786, 790 (Vt. 1992).

237. See *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (citing *Parham v. J.R.* 442 U.S. 584, 602 (1979)).

238. *Troxel*, 530 U.S. at 72–73.

239. See *supra* note 196 and accompanying text.

authority by that very court.<sup>240</sup> The father argued that the “[m]other cannot move wherever she chooses because she had legal custody of the child,” citing no authority for the statement, except that the relocation statute<sup>241</sup> required that she show that the move was made in good faith and was in the best interest of the child.<sup>242</sup>

But legal custody, by its very terms, must imply that a parent or guardian has the right to make decisions regarding a child’s upbringing, including decisions about health, education, religion, and welfare, unless a court concludes that a child’s physical health would be endangered or the child’s emotional development impaired without the limitation of the legal custodian’s authority.<sup>243</sup> It seems axiomatic that if a parent has been allocated the authority to make such life-altering decisions, such as whether the child will undergo a major medical procedure, or be home-schooled rather than attend a public school, that parent could also retain the right to determine the child’s residence, so long as that decision does not “significantly and detrimentally” impinge on the other parent’s visitation time.<sup>244</sup>

Missouri law allows the mere request to relocate to reopen a settled custody decision—exploring the best interest factors in excruciating detail—simply because one parent claims the move may not serve the welfare of the child. But as put by one Missouri court:

There is no magic in [the] phrase, ‘welfare of the child,’ however. It is no open sesame to unbridled judicial discretion; it is no talisman by which the court’s jurisdiction can be stretched beyond its limits . . . . The protection of the child’s welfare has indeed been the object of the courts in custody cases from earliest times; but the attainment of that object requires the observance of principles considerably more practical and less nebulous than a mere declaration of beneficent purpose.<sup>245</sup>

Further, statutes that grant decision-making authority to custodial parents, and statutes that limit conduct by custodial parents that would “impinge” on a non-custodial parent’s visitation time, are not at odds. Statutes are not to be construed in a vacuum.<sup>246</sup> When two statutes conflict when read together, courts should seek to harmonize them, giving effect to both to the extent it is possible.<sup>247</sup> When reading § 452.377 (the relocation statute) together with §

240. Brief for Respondent at 15, *Buchheit v. Berkgigler*, No. 89113 (Mo. Ct. App. E.D. Oct. 16, 2007), 2007 WL 3249950.

241. Mo. Rev. Stat. § 452.377.8.

242. *Buchheit*, Brief for Respondent, at 15.

243. MO. REV. STAT. §§ 452.375.2, 452.405.1.

244. See *Salichs v. James*, 268 A.D.2d 168, 171 (N.Y. App. Div. 2000).

245. *Jenks v. Jenks*, 385 S.W.2d 370, 377 (Mo. Ct. App. 1964).

246. *Baxley v. Jarred*, 91 S.W.3d 192, 209 (Mo. Ct. App. 2002) (citing *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. banc 1997)).

247. *Id.*



452.405 (the legal custodian statute), the most logical interpretation of the two would be to find that a relocation by a legal custodian occurring under § 452.377 may only be prohibited where it is shown that the legal custodian's decision about the change of residence would result in certain consequences. These consequences should require either: (1) endanger the child's physical health; (2) impair the child's emotional development; or (3) "significantly and detrimentally" interfere with the other parent's visitation or custody time in a way that could not be salvaged by reallocating the visitation/custody periods and allocating transportation costs, pursuant to § 452.377.10. This is the approach taken by several other states that have recognized that the court should only have the authority to constrain a move by a custodial parent when the move will substantially interfere with the non-custodial parent's visitation.<sup>248</sup> Missouri courts have long held that parents, rather than judges, should make major child-rearing choices because judges are ill-equipped to know the unique needs of the child.<sup>249</sup> As the Court stated in *Jenks*:

Courts are not so constituted as to be able to regulate the details of a child's upbringing. It exhausts the imagination to speculate on the difficulties to which they would subject themselves were they to enter the home or the school or the playground and undertake to exercise on all occasions the authority which one party or the other would be bound to ascribe to them. . . . Thus, while the court ought continually to supervise the decisions of the custodian, it ought only rarely to dictate them. Any other policy will surely oblige the court to assume every responsibility which it denies to the custodian the discretion to discharge, and, in its farthest extension, substitute judicial paternalism for custodial responsibility.<sup>250</sup>

248. See, e.g., *Hollandsworth v. Knyzewski*, 79 S.W.3d 856, 862 (Ark. Ct. App. 2002) (Pittman, J., concurring) (Limiting review of relocation disputes only in cases where the "planned relocation is to a place so geographically distant as to render weekly visitation impossible or impractical"); *Baures v. Lewis*, 770 A.2d 214, 227 (N.J. 2001). Indeed at least one Missouri relocation cases has advocated this approach, but it has been overlooked in more recent cases. *In re Marriage of Mayfield*, 780 S.W.2d 139, 143 (Mo. Ct. App. 1989) ("[R]emoval of the child from the jurisdiction should not be disallowed solely to maintain the existing visitation patterns.") (citing *In re Marriage of Dusing*, 654 S.W.2d 938, 942-43 (Mo. Ct. App. 1983); *Auge v. Auge*, 334 N.W.2d 393, 397-99 (Minn. 1983); *D'Onofrio v. D'Onofrio*, 365 A.2d 27, 29 (N.J. Ch. 1976).

249. See, e.g., *Jenks*, 385 S.W.2d at 377-78.

250. *Id.* at 377. Although *Jenks* is an older case, it is still very much good law. No Missouri case has overruled its proposition on this issue, and *Jenks* has been cited frequently by courts both within and without of Missouri for its proposition on this issue. See e.g., *Leahy v. Leahy*, 858 S.W.2d 221, 226 (Mo. 1993). Further, one of the leading family law casebooks continues to use a discussion of *Jenks*' reasoning as an illustration of the court's proper role in acting as a "tie-breaker" for parents who cannot agree. See WALTER WADLINGTON & RAYMOND C. O'BRIEN, DOMESTIC RELATIONS: CASES AND PROBLEMS 1155 (6th ed. 2008).

Yet, more fundamentally at issue, is that the new family unit created by a couple's divorce or separation should be entitled to the same amount of parental and individual autonomy and freedom from government intrusion into its child rearing decisions as are allotted to an intact family.<sup>251</sup> When a trial court attempts to dictate to a fit custodial parent where the parent can create his or her residence, the court is not only "substituting judicial paternalism" for a parent's reasoned judgment, it is infringing on that parent's constitutional rights.<sup>252</sup> As the Supreme Court held in *Troxel*, a trial court's disagreement with a mother concerning what is in the child's best interest is insufficient to override that parent's rights to choose how to raise her child.<sup>253</sup> As the Court explained, "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."<sup>254</sup>

Currently, a father alone may choose to bar the exercise of the mother's right, or he may do nothing and permit her relocation; the choice is his, and his alone when he is the objecting party.<sup>255</sup> A father takes on the role of gatekeeper, deciding whether State intervention into the mother's decision-making will take place, while a custodial mother can only wait and hope that her former spouse or lover chooses not to invoke the heavy-handed power of state intervention. Such a policy renders the State, at least in relocation disputes, as little more than an agent of the father, as the choice is solely his as to whether State involvement will be invoked.<sup>256</sup>

As a New Jersey court put it, relocation restrictions which trap a woman in a geographic location near her child's father are "consigning [her] for the next decade and a half to the immediate orbit of a man to whom she was briefly and unhappily married, to what [may be] for her an alien environment in which she has neither family nor professional ties, and to what would mean for her the sacrifice of her own professional, social and personal interests."<sup>257</sup>

The overwhelming amount of discretion granted to fathers might be compared to the spousal-consent deemed unconstitutional by the *Casey* court. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>258</sup> the Supreme

251. See, e.g., *Stephen v. Stephen*, 937 P.2d 92, 99–100 (Okla. 1997).

252. *Troxel v. Granville*, 530 U.S. 57 (2000); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that even where there is a risk that a child living with a stepparent of another race may be subjected to pressure and stress, it is insufficient to infringe upon a parent's fundamental liberty interest); see also *Stephen*, 937 P.2d at 97 ("The trial court's personal beliefs should not be forced on a custodial parent who has made a legitimate decision for the benefit of the minor children.").

253. *Troxel*, 530 U.S. at 63.

254. *Id.* at 72–73.

255. See LaFrance, *supra* note 54, at 92.

256. *Id.* at 93.

257. *Helentjaris v. Sudano*, 476 A.2d 828, 832 (N.J. Super. Ct. App. Div. 1984).

258. 505 U.S. 833 (1992).

Court held that a burden on freedom of choice is “undue”—and therefore unconstitutional—when it deters women from exercising constitutionally protected choices.<sup>259</sup> In *Casey*, one of the burdens was notifying a husband before getting an abortion;<sup>260</sup> in the present case it is the burden of a mother potentially losing custody of her child to a former husband (or lover) as a consequence of her relocation. In either instance, the burden may deter exercise of a fundamental right and deny due process. The *Casey* Court held that marriage is an association of individuals and “[t]he Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.”<sup>261</sup> Further:

[A] husband’s interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. A husband has no enforceable right to require a wife to advise him before she exercises her personal choices. . . . A state may not give to a man the kind of dominion over his wife that parents exercise over their children.<sup>262</sup>

Although *Casey*’s holding applies to a mother’s choice in bearing a child, a mother’s choice to relocate herself and her children to another geographical area continues to fall under *Casey*’s recognition of the privacy and primacy of a woman’s right to make choices about how to rear her children. To hold that a mother’s liberty interest and decision-making concerning whether to bear her child (if at all) should be more highly valued than her right to decide where she can rear the very child she has borne would amount to an obvious absurdity, for it would be to effectively hold that a mother’s right to make decisions for herself and her child diminishes at precisely the time she needs more (rather than less) discretion over how to rear her children.

As in the underlying facts of *Casey*, Missouri’s relocation statute gives a father veto power over many of a mother’s most basic, fundamental rights and personal decisions. A father’s ability to prevent a mother’s relocation could possibly impinge on a mother’s right and ability to marry, should such a marriage involve a relocation on her part, and may even limit her ability to create a new, intact family for herself and her child. If a father chooses not to object to a proposed relocation on the part of a mother, she is freely allowed to travel and relocate. If a father chooses to prevent the relocation, he has all too often quashed any opportunity the mother had for a new life she felt was in the best interest of herself and her children. Such authority not only results in the father oftentimes having ultimate control over whether a relocation is likely to

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259. *Id.* at 895.

260. *Id.* at 838.

261. *Id.* at 896.

262. *Id.* at 898.

take place, but also grants him dominion over the exercise of a mother's most basic and fundamental rights.<sup>263</sup>

"The state registers no gain towards its declared goals when it separates children from the custody of fit parents."<sup>264</sup> In *Moore v. City of East Cleveland*,<sup>265</sup> the Court held that when a city attempted to restrict the right of a family to live together, "this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged restriction."<sup>266</sup> If Missouri's objective was to promote and preserve the best interests of the children of divorce who are facing relocation, then Missouri's relocation laws seemingly do little to protect these interests. Missouri's relocation law, however, does result in enormous fallout and damage to the families held captive to a geographical area by the whims of a mother's former husband or lover. The statute is also grossly underinclusive in meeting its purported interest, because the statute does not require parents to live in geographic proximity to each other. Even when parents live great distances away from one another, courts have fashioned custody-sharing arrangements. For example, the court has no authority to consider the relocation statute in an initial custody determination.<sup>267</sup> Similarly, the non-custodial parent can choose to move to a distant location at any time, no matter how difficult it will be for the children or for the other parent.<sup>268</sup>

These interests are protected and promoted by the state to the exclusion of a mother's new family, home or career, and all too often to the detriment of her family, husband, or children. Upon attempting to relocate, a custodial mother can have every aspect of her decision-making questioned and probed by a court, her parenting examined, and the most intimate details of her life unearthed for review, and all at her former lover's behest. If there still exists a "private realm of family life which the state [should not] enter," the decision

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263. *Id.* at 851 ("Our laws afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

264. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

265. 431 U.S. 494 (1977).

266. *Id.* at 499.

267. *Day ex. rel. Finnern v. Day*, 256 S.W.3d 600, 603, (Mo. Ct. App. 2008).

268. "[A] noncustodial parent can relocate at will—without leave from or even providing notice to any court—no matter what impact relocation may have on the children or the ability of the custodial parent to fulfill parenting functions . . . No matter how [a father's potential] relocation might affect [his children] emotionally, socially, or otherwise, no one suggests that [the mother] is entitled to seek a decree ordering her former husband to remain in Arkansas to continue his relationship with . . . the children . . ." *Hollandsworth v. Knyzewski*, 79 S.W.3d 856, 873 (Ark. Ct. App. 2002).

concerning where to rear one's children should most certainly be included within that realm.

### 3. Right to Marry

Remarriage is one of the most commonly asserted reasons for relocation. It is also common for a mother to request to relocate based on a new spouse's employment transfer. Missouri's relocation law may prohibit parents from relocating to live with a new spouse—a prohibition that interferes with the parent and the new spouse's constitutional right to marry.

The Supreme Court has recognized that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”<sup>269</sup> The right to marry predates the Constitution and exists as a part of the liberty guaranteed by the First, Ninth, and Fourteenth Amendments.<sup>270</sup> Because the right to marry is fundamental, a state may only interfere with the right when it asserts a compelling state interest and assures that that interest is narrowly tailored.

In *Zablocki v. Redhail*,<sup>271</sup> the Supreme Court struck down a Wisconsin statute preventing any resident required to support minor children from getting married without showing that the support obligation was being paid and that the children were not likely to become public charges. In so holding, the Court found the state did not show a “compelling state interest” or a means “narrowly tailored” because the statute in no way ensured that support money was being paid to children, and the state had other and more effective ways to ensure that children received financial support from their parents.<sup>272</sup>

*Zablocki*'s reasoning applies to custody cases where a court forces a parent to forfeit custody of her child if she chooses to live with a new spouse.<sup>273</sup> Certainly if a state does not have a compelling state interest to restrict marriage to compel financial support for minor children, it is hard to imagine a state having a compelling interest to restrict marriage because the minor child needs regular contact with both parents; yet, that contact can be provided for by alternative visitation schedules and a reallocation of transportation costs.

Although Missouri's relocation law, unlike the law in *Zablocki*, does not directly prohibit a parent from obtaining a legal marriage, it can and does

269. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

270. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978); *Griswold v. Connecticut*, 381 U.S. 479, 491 (1965); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

271. 434 U.S. 374 (1978).

272. *Id.* at 395–96.

273. Several family law scholars have opined that relocation restrictions that hinder a woman's right to marry and relocate to live with her new husband violate the mandate set forth in *Zablocki v. Redhail*. See, e.g., Bruch, *supra* note 34, at 293–94 n.57.

prevent mothers from relocating to live with their new spouses. Under Missouri law, the right to cohabit with a spouse is inherent in the fundamental right to marry.<sup>274</sup> At a minimum, prohibiting a mother from relocating to live with her soon-to-be spouse unconstitutionally “chills the exercise” of the right to marry. This is seen in many cases where mothers have delayed wedding plans pending the outcome of their relocation cases.<sup>275</sup> In these situations, it is hard in many cases to even see a rational basis for denying a mother the right to relocate her residence to live with her new husband—which threatens to destroy an intact marriage and family for the sake of “preserving” a dysfunctional one.<sup>276</sup>

A mother’s remarriage not only benefits the mother, but generally improves a child’s economic and emotional well-being. Women who remarry increase the family income threefold and decrease the likelihood that their children will live in poverty.<sup>277</sup> Stepfathers may also alleviate some of the child-rearing burdens placed on mothers: they may be available to share in supervising and transporting the children, help with homework, and communicate with the children. In fact, recent research has shown that psychologically, children can benefit as much from a good relationship with a stepfather as they can with their biological father.<sup>278</sup>

Select courts have recognized the moral bankruptcy in requiring a parent to literally choose between her new spouse and her child. For example, the Nebraska Supreme Court reversed a trial court’s and appellate court’s ruling that refused to allow the custodial mother to move to Arizona with her son, to join her new husband there.<sup>279</sup> There, the trial court found that the mother was better suited to be residential parent, but still disallowed her move.<sup>280</sup> The court held Nebraska would not force a custodial parent to make such a choice between her son and her spouse.<sup>281</sup> Similarly, in criticizing an Arkansas trial court’s holding that denied a mother the right to relocate to live with her new spouse, an Arkansas appellate judge noted:

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274. *Komosa v. Komosa*, 939 S.W.2d 479, 483 (Mo. Ct. App. 1997).

275. See notes 211–20 and accompanying text (discussing a case with similar circumstances).

276. See Bruch, *supra* note 34, at 293–94 n.57.

277. See MARY ANN MASON, *THE MODERN AMERICAN STEPFAMILY: PROBLEMS AND POSSIBILITIES*, in *ALL OUR FAMILY: NEW POLICIES FOR A NEW CENTURY* 100–01 (Mary Ann Mason, et al. eds., 2003); Christine Bachrach, *Children in Families: Characteristics of Biological, Step-, and Adopted Children*, 45 J. MARRIAGE & FAM. 171, 176 (1983) (stating that almost 49% of children living with a single mother are living below the poverty line, in contrast to 8% of children who live with a mother and step-father).

278. Lynn White & Joan G. Gilbreth, *When Children Have Two Fathers: Effects of Relationships with Stepfathers and Noncustodial Fathers on Adolescent Outcomes*, 63 J. MARRIAGE & FAM. 155, 160 (2001).

279. *Harder v. Harder*, 524 N.W.2d 325, 329–30 (Neb. 1994).

280. *Id.*

281. *Id.*

One would ordinarily think that courts encourage marriage. After all, judges and other officiants at marriage ceremonies profess that marriage is an honorable estate. I know of no caveat that holds remarriage to be less honorable or less worthy of affirmation. . . . So it is more than a little strange that the law would essentially penalize a custodial parent who takes the honorable step of marriage following divorce if remarriage carries the prospect of life outside [the state].<sup>282</sup>

#### D. *Pervasive Bias*

There is ample reason to believe that much of the reluctance to allow mothers to relocate with their children comes from an inherent bias in the judiciary.<sup>283</sup> The best interest standard, standing alone, has been criticized as being unduly vague.<sup>284</sup> As a consequence, judges often rely on their own life experiences and biases in making rulings.<sup>285</sup> Precisely because the standards are vague, it is easy for judges to hide potentially irrelevant, sexist, or geographical biases and substitute their own values for those of the legislature.<sup>286</sup> In multiple studies, judges have admitted to not complying with state statutes or precedent when making custody decisions.<sup>287</sup> Often the trial court will fail to even “make findings of fact, to write an opinion, or to reconcile the case with precedent.”<sup>288</sup> When judges are given virtually unbridled discretion to decide child custody disputes, and in turn use that

282. *Hollandsworth v. Knyzewski*, 79 S.W.3d 856, 862 (Ark. Ct. App. 2002) (Griffen J., concurring).

283. See *infra* notes 324–94 and accompanying text.

284. See *supra* notes 185–210 and accompanying text (criticizing the best interests test as vague, biased, and unworkable in practice).

285. See, e.g., Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOL. SCI. PUB. INT. 1 (2005); Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 16 (1984) (Custody decisions are often determined by what is “in the heart of the trial judge(s)”; Susan Beth Jacobs, *The Hidden Gender Bias Behind the “Best Interest of the Child” Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 849 (1997); Charlow, *supra* note 107, at 271; Duggan, *supra* note 44, at 195, (stating that judges “kid [themselves] if [they] think [they] are applying some value-neutral best interest standard instead of one based on [their] own prejudices and biases”); Sheehan, *supra* note 177, at 138; Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 257–62 (1975); Judith A. Fournie, Note, *Post-Divorce Visitation: A Study in the Deprivation of Rights*, 27 DEPAUL L. REV. 113, 113 (1977); Pfenning, *supra* note 180, at 118–19, 124.

286. *Id.* at 272–73; Pastis, *supra* note 45, at 420.

287. Charlow, *supra* note 107, at 272; see also Pfenning, *supra* note 181, at 119 (reviewing decisions from multiple jurisdictions and arguing that judges do not always follow legal mandates when deciding child custody actions).

288. Pastis, *supra* note 45, at 425 (citing Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 253–54 (1975)).

discretion to subvert the legislature's intent, statutes that were created to protect children might end up harming them.<sup>289</sup>

### 1. Gender Bias

Relocation jurisprudence has been hailed as a critical women's legal issue.<sup>290</sup> In many cases, the decisions often appear to be based on outmoded stereotypes of what a "good mother" is supposed to look like.<sup>291</sup> Both anecdotal reports and reports from task forces in various states show that gender bias is a problem in both relocation cases and other child custody decisions.<sup>292</sup> Some have called it a "nationwide backlash of [gender] discrimination" disguised by the best interest standard.<sup>293</sup>

For an example of this bias, consider one court that "applaud[ed] the mother's] efforts to be upwardly mobile economically, and [found] her efforts at job improvement count[ed] to her advantage as a role model," but nevertheless denied her petition to relocate.<sup>294</sup> Such career-seeking moves were often seen to be in conflict with the child's overall well-being.<sup>295</sup> Nor are moves by a mother in order to attend college, obtain a graduate degree, or enter a specialized education program often viewed favorably by judges.<sup>296</sup> Missouri judges fared no better in anecdotal reports published by the Missouri Task Force on Gender and Justice. As the director of the Missouri Coalition Against Domestic Violence testified, "There are often inappropriate comments and belittling behaviors that occur within the courtroom from the bench."<sup>297</sup> Custody decisions show that "mothers are losing custody as a result of . . . inappropriate criteria caused by gender bias unrelated to the best interest of the child."<sup>298</sup>

289. See Pfenning, *supra* note 180, at 119.

290. Ford, *supra* note 69, at 1; *see generally* Pastis, *supra* note 45 (arguing that restricting the mobility of custodial parents is a form of sex-based discrimination).

291. Jacobs, *supra* note 285, at 868 (1997).

292. Sheehan, *supra* note 177, at 135 (stating that child custody laws reinforce stereotypical gender roles in families).

293. Jacobs, *supra* note 285, at 848–49 (quoting Laurie Woods et al., *Sex and Economic Discrimination in Child Custody Awards*, 16 CLEARINGHOUSE REV. 1130 (1983)).

294. Glennon, *supra* note 38, at 129 (quoting *Fields v. Fields*, 749 N.E.2d 100, 109 (Ind. Ct. App. 2001)).

295. *Id.* at 129–30.

296. Glennon, *supra* note 38, at 135–36.

297. Task Force on Gender & Justice, *supra* note 154, at 505.

298. Jacobs, Nancy D. Polikoff, *Why are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 236 (1982); *Richmond v. Tecklenberg*, 396 S.E.2d 111 (S.C. Ct. App. 1990); *Anderson v. Anderson*, 472 N.W.2d 519 (S.D. 1991).



Even when relocation standards are applied evenhandedly, they often have a disparate effect upon women.<sup>299</sup> One reason for criticism is that focusing on objective criteria tends to obscure the less quantifiable psychological aspects of relocation—judges overemphasize quantifiable factors such as an increase in income and ignore the more personal factors such as a need to start over or to get remarried.<sup>300</sup> And if the economic positions of the parties are compared, “women are likely to be disadvantaged.”<sup>301</sup>

Restraining women in their movement invokes criticism because it allows for men’s domination of women even after a marriage has ended, particularly in relocation cases where implicit notions of appropriate gender roles often influence judicial decisions.<sup>302</sup> Overall, “residence restrictions are sex-based in their application, justification, and effect because they exist to protect only the interests of the noncustodial father.”<sup>303</sup>

## 2. Status Quo Bias

Studies indicate that, generally, judges do not like deciding family law cases.<sup>304</sup> Judges may dislike having to upset the status quo and often become impatient when family law attorneys appear frequently before the court to secure their clients’ rights.<sup>305</sup> As a result, judges are inclined to find that preserving the status quo is the best way to preserve the best interests of the child.<sup>306</sup> The difficulty inherent in deciding whether children should be relocated encourages judges to avoid the consequences of a potential decisional error by preserving the custody arrangement the way it is and by forcing the mother to make the difficult choice of whether she should stay or go.<sup>307</sup> This type of decision avoidance has been called “choice deferral.”<sup>308</sup>

299. Sheehan, *supra* note 176, at 138 (arguing that they cause disparate economic effects); Pastis, *supra* note 45, at 420 (arguing that they give father veto power over the mother).

300. Sheehan, *supra* note 176, at 138.

301. *Id.*

302. *Id.* at 135, 136 (citing Fran Olsen, *The Politics of Family Law*, 2 LAW & INEQ. 1 (1984)).

303. Pastis, *supra* note 45, at 421 (“If most custodial parents were men, residence restrictions would cease to exist or would be analyzed differently; the focus would finally be on the real interests at stake for all involved.”).

304. One judge complained that “[he] would rather send someone to life in the penitentiary” than decide a child custody case. Charlow, *supra* note 107, at 272 (citing Jessica Pearson & Maria A. Luchesi-Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703 (1982–83)); see also Task Force on Gender & Justice, *supra* note 154, at 537–39 (reporting that Missouri judges have negative attitudes toward family law, believe it to be lower-status work, and often dislike deciding private family matters).

305. See Task Force on Gender & Justice, *supra* note 154, at 539.

306. See Marie Eyre et al., *Decision Inertia: The Impact of Organizations on Critical Incident Decision-Making*, in POLICING CRITICAL INCIDENTS: LEADERSHIP AND CRITICAL INCIDENT MANAGEMENT 207 (Laurence Alison & Jonathan Crego, eds., 2008).

307. *Id.*

308. *Id.* at 208.

Psychologically, people are inclined “to weigh potential losses more than potential gains in the same amount.”<sup>309</sup> To explain, when faced with the choice between potential harm to the child associated with moving to a distant location and the potential improvements that a move may bring to a child’s life, judges may seek to minimize the harm to the child, rather than maximize the gain. Judges avoid the guilt they could potentially incur as a result of their actions by merely declining to act.<sup>310</sup> This overly simplistic thinking, however, fails to account for the harm both the mother and the child may face by suffering through prolonged litigation and sacrificing important goals.

### 3. Nuclear Family Bias

Family law has often intruded into people’s most important life choices. Divorced and never-married parents have to justify decisions in a way that would never be required of intact families. For example, it is likely that no one would question an intact family’s decision to relocate for a job opportunity even if there was clear evidence that the relocation would have detrimental effects on the child. The reasons for the nuclear family bias are unclear. Is it that only children of divorce or out-of-wedlock relationships are worth protecting? Is it that only married parents are capable of making good choices for how to raise their children?

Judge Duggan has criticized the adversarial custody system as taking power away from parents.<sup>311</sup> As he explains, “They’re their kids—the parents should decide what’s best . . . our goal should be to empower parents and assist them in reaching decisions that are in their children’s best interest. Instead, at every step, we disempower them.”<sup>312</sup>

In *In re the Marriage of Burgess*, the court came closer to this ideal when it refused to allow trial courts to “‘micromanage’ . . . everyday decisions about career and family.”<sup>313</sup> We presume that parents in intact families “[make] the decision to move with the best interests of their children in mind.”<sup>314</sup> There is no reason why the same should not hold true when a mother in a post-divorce family decides to move since the awarding of custody to the mother has created a new family unit, and an initial court proceeding found the mother to be the best custodian to protect the child’s interests.<sup>315</sup> As some have observed, “There is no greater need for the court to substitute its judgment of

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309. *Id.*

310. *See id.*

311. Duggan, *supra* note 44, at 193.

312. *Id.* at 196.

313. *In re Marriage of Burgess*, 913 P.2d 473, 481 (Cal. 1996).

314. Bowermaster, *supra* note 96, at 445; Pastis, *supra* note 45, at 431; Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 618 (2001).

315. Pastis, *supra* note 45, at 431.

what will serve the best interests of the child in the post-divorce family unit than in the traditional family setting.”<sup>316</sup> Allowing judicial inquiry into the decisions of the custodial parent only serves to destabilize a new family unit and encourage hostility between the two parents.<sup>317</sup>

Some courts have created a more reasoned response to a parent’s request to relocate: they have recognized that divorce alters the relationship between children and their parents and that it is unrealistic to pretend that a broken family will continue to live as if the family is still intact.<sup>318</sup> As the Connecticut Supreme Court wrote, “It may not be realistic to try to preserve completely the quality and nature of the relationship that the noncustodial parent enjoyed with the child, especially if such preservation is maintained at the cost of the custodial parent’s ability to start a new, potentially improved life for herself or himself and the child.”<sup>319</sup>

#### 4. Economic Bias

The price tag of litigating relocation disputes, coupled with the uncertainty of succeeding, is likely a significant enough deterrent to prevent women from attempting to move if they suspect the non-custodial parent would object.<sup>320</sup> Consider the case of the domestic violence victim, Deb,<sup>321</sup> who was a successful businesswoman.<sup>322</sup> In the course of the litigation, she was forced to quit work, enroll in welfare, and pay over \$15,000 for psychological evaluations—not including the costs of her son’s weekly therapy sessions.<sup>323</sup> By the time her case was over, “she owe[d] her family law attorney \$50,000, owe[d] her parents \$50,000, and file[d] for bankruptcy.”<sup>324</sup> Because men are generally in a better financial situation than women after divorce,<sup>325</sup> men can sometimes use the cost of litigation as a weapon to oppress women’s legal rights. This is sometimes termed “winning by financial attrition.”<sup>326</sup>

316. *Id.*

317. Ford, *supra* note 69, at 19 (citing Barbara E. Handschu, *Revolution in Relocation Law*, N.Y. L.J., May 17, 1996, at 1).

318. *See, e.g.,* Ireland v. Ireland, 717 A.2d 676, 681 (Conn. 1998); D’Onofrio v. D’Onofrio, 365 A.2d 27, 29-30 (N.J. Super. Ct. Ch. Div. 1976).

319. Ireland, 717 A.2d at 681.

320. *See* Sheehan, *supra* note 176, at 139, 144.

321. *See supra* notes 136–53 and accompanying text.

322. Bowermaster, *supra* note 96, at 435.

323. *Id.* at 434–35.

324. *Id.* at 435.

325. “[T]he average divorced man can earn as much as the couple’s entire net worth in only ten months after the divorce.” Kathryn E. Abare, Note, *Protecting the New Family: Ireland v. Ireland and Connecticut’s Custodial Parent Relocation Law*, 32 CONN. L. REV. 307, 324 (1999) (citing SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 163 (1989)).

326. Task Force on Gender & Justice, *supra* note 154, at 535.

The cost of divorce often leaves women in dire economic straits.<sup>327</sup> Women are disadvantaged financially for a number of reasons, but often it is because they have taken time out of the labor force to raise children and perform household labor.<sup>328</sup> The first year after divorce, a woman with children is likely to see a 73% decrease in her standard of living.<sup>329</sup> Immediately after divorce, poor mothers are often forced by economics to move frequently—on average seven times within the first six years of divorce.<sup>330</sup>

Justice Wendell Griffen, writing for the Arkansas appellate court in *Hollandsworth v. Knyzewski*, recognized the increased difficulties women face post-divorce and explained that the difficulties are directly related to women's reasons for relocation:

Our society has long practiced a double standard regarding social freedom and gender. . . . [M]en are unentitled beneficiaries of greater social, economic, and cultural freedom than women who, for reasons largely due to gender, labor under greater social, economic, and cultural burdens when they try to exercise freedoms men often take for granted. Men are less likely to encounter social ostracism than women after divorce, no matter the reason for divorce. They are less prone to encounter discrimination on account of their gender in the workplace, whether they are custodial parents or not. . . . [T]hroughout American society, men earn decisively more money than women, even when performing the same work. Thus, the social, economic, and cultural forces that might influence a divorced woman to relocate to another state usually will not affect men the same way. . . . I cannot ignore the gender-specific consequences it portends.<sup>331</sup>

Restricting women from opportunities that will provide them better jobs, further their education, or allow them to remarry increases the likelihood that women will end up in poverty.<sup>332</sup> Such relocation policies that restrict the opportunities of women are unwise. Author Ann Crittenden tells of a

327. ALLISON CLARKE-STEWART & CORNELIA BRENTANO, *DIVORCE: CAUSES AND CONSEQUENCES* 97 (2006).

328. *Id.* at 200. Taking time out of the labor force can prevent them from getting raises, decrease their retirement savings, and make them less employable when they decide to reenter the workforce. *Id.* at 200–02. Even when women remain in the workforce, they often are required to work part time or take flexible employment, or take more time off of work to meet their child-rearing obligations. *Id.* at 112, 200.

329. See JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* 19 (1989) (citing LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 323 (1985)).

330. HETHERINGTON & KELLY, *supra* note 88, at 88.

331. *Hollandsworth v. Knyzewski*, 79 S.W.3d 856, 874 (Ark. 2002).

332. See CLARKE-STEWART & BRENTANO, *supra* note 328, at 97 (discussing a study of sixty middle-class women after divorce, finding that most women struggled to survive economically and two years after the divorce, 85% did not recover economically).

conversation she had with Lawrence Summers, a distinguished economist, former president of Harvard, and newly appointed head of the White House Economic Council, where he explained that “[r]aising children is the most important job in the world.”<sup>333</sup> This is so because in today’s economy, two-thirds of the world’s wealth is created by “human capital”: the skills, creativity, and enterprise of humans.<sup>334</sup> As economist Shirley Burggraf explained, this means that parents rearing their children are “the major wealth producers in our economy.”<sup>335</sup> But to properly support and raise children, mothers require a stable and secure income.

Judicial policies that inhibit women’s plights to seek better lives for themselves and their children through higher education, a better job opportunity, or remarriage virtually ensure that women have little opportunity to escape a perilous, semi-dependent economic status. Rather, states should encourage mothers to seek post-secondary education and certainly not penalize them if they seek to relocate to obtain a college degree or further education or employment opportunities. The benefits for both the mother and the children are profound. Women’s salaries dramatically increase with college degrees, degrees reduce mothers’ likelihood of being poor by about fifteen percent, and degrees help insulate women from economic downturns.<sup>336</sup> College education also increases mothers’ expectations of their children’s achievement, encourage children’s own educational aspirations, and correlate with early development of literacy skills in children—which increases the likelihood the children will be successful in school.<sup>337</sup>

#### E. *Contingent Custody Transfers*

Usually when judges deny a relocation request, they order what is called a “contingent custody transfer,” which is a conditional order where the non-custodial parent (usually father) is awarded physical custody of the children if, and only if, the custodial parent (usually mother) chooses to relocate.<sup>338</sup> This type of order is effectively “judicial blackmail”—the purpose is to strong-arm the custodial parent, likely the mother, into abandoning the move and

333. ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 2 (2001).

334. *Id.*

335. *Id.* (quoting SHIRLEY P. BURGGRAF, *THE FEMININE ECONOMY AND ECONOMIC MAN* 64 (1997)) (internal quotation marks omitted).

336. Peggy Kahn et al., *Introduction*, in *SHUT OUT: LOW INCOME MOTHERS AND HIGHER EDUCATION IN POST-WELFARE AMERICA* 1, 9 (Valerie Polakow et al. eds., 2004).

337. *Id.*

338. Bruch, *supra* note 34, at 284; Caroline Ritchie Heil, Comment, *Relocation Cases as Change in Custody Proceedings: “Judicial Blackmail,” or Competing Interests Reconciled?*, 51 S.C. L. REV. 885, 896 (2000).

maintaining the status quo.<sup>339</sup> Most of the time judges make these orders expecting the custodial parent to abandon the move, and as a result, judges enter the order without considering whether it would be more harmful for the child to change custody than it would be for the child to relocate with the custodial parent.<sup>340</sup>

At times the custodial parent, likely the mother, may have no choice but to move. In those circumstances, the conditional custody transfer makes no sense—the child will still have to move, but the move will be into the home of the non-custodial parent rather than relocating with the custodial parent.<sup>341</sup> Not only is the child faced with the detrimental effects of a move, but the child also faces the loss of his or her primary caretaker.<sup>342</sup>

If the parent “chooses” not to relocate, however, he or she may retain the status quo and keep custody of the child. For most parents, usually mothers, that “choice” is not really a choice at all.<sup>343</sup> Commentators have called decisions such as these a “Sophie’s Choice,” referring to the the William Styron novel of that name that chronicles the lead character’s forced decision in a Nazi concentration camp to choose which one of her two children would live and which would die.<sup>344</sup> Judges may fail to consider the collateral damage such “choices” may cause. Mothers who give up significant life opportunities often become depressed and resentful for their “grievous loss.”<sup>345</sup> Children can often sense their mother’s anguish resulting from the lost opportunity and may become emotionally disturbed as a result.<sup>346</sup> Tensions between the warring parents often get worse, not better, following the end of the relocation trial.<sup>347</sup> As a result, children may receive diminished parenting.<sup>348</sup> Yet, as Ann

339. Bruch, *supra* note 34, at 284–85.

340. *Id.*; *see also In re Marriage of LaMusga*, 88 P.3d 81, 102 (Cal. 2004) (Kennard, J., dissenting); *In re Marriage of Burgess*, 913 P.2d 473, 481, n.7 (Cal. 1996).

341. Bruch, *supra* note 34, at 284.

342. *Id.*

343. LaFrance, *supra* note 54, at 39.

344. *Id.* at 9 n.49; *see also Lane v. Schenck*, 614 A.2d 786, 792 (Vt. 1992) (using the term “Sophie’s choice” to describe the mother’s dilemma).

345. Wallerstein & Tanke, *supra* note 38, at 315.

346. Consider the letter sent to Judith Wallerstein and attached as Appendix A to her Amicus Brief. Brief for Tony J. Tanke as Amicus Curiae Supporting Respondents, *supra* note 88, at Appendix A, 1. There, a mother who was initially forced to give up her dream to go to medical school reported that her seven-year-old daughter “repeatedly asked [her] if [she] was going to leave [the daughter] to go to medical school” and as a result began having nightmares and chronic stomachaches. *Id.* The child’s pediatrician explained to the mother that the child’s medical issues derived from her anguish that the mother might choose to go to medical school without taking her. *Id.*

347. Valdespino, *supra* note 99, at 22.

348. *Id.*; *see also Bruch*, *supra* note 34, at 287 (citing Judith S. Wallerstein & Julia M. Lewis, *The Unexpected Legacy of Divorce: Report of a 25-Year Study*, 21 PSYCHOANALYTIC PSYCHOL. 353, 359 (2004)) (“[S]tressed-out parents provide . . . ‘seriously diminished parenting.’”).

Crittenden argues, “It isn’t fair to expect mothers to make sacrifices that no one else is asked to make, or have virtues that no one else possesses, such as a dignified subordination of their personal agenda and a reliance on altruism for life’s meaning.”<sup>349</sup> In fact, “Virtues and sacrifices, when expected of one group of people and not of everyone, become the mark of an underclass.”<sup>350</sup>

Other states, such as the Vermont Supreme Court, have disallowed the use of conditional custody transfers to regulate the choices of custodial parents.<sup>351</sup>

Missouri should follow the lead of other states by finding that conditional orders may not be used to “blackmail” a mother into abandoning her relocation plans.

#### IV. PROPOSED SOLUTIONS

One author has argued that “[g]iven the existing patchwork of state laws and the peripatetic nature of contemporary society, any effort to impose strict limits on the movement of parties post-divorce seems naïve at best, unconstitutional at worst, and doomed to almost certain failure in any event.”<sup>352</sup> Missouri’s archaic relocation laws, based on unrealistic notions about post-divorce life, are in need of serious revision.

Family law scholars have long argued that child custody decisions, including relocation decisions, should be governed by a set of objective standards that would minimize potential bias, while still allowing judges a certain level of discretion.<sup>353</sup> Scholars have proposed a wide variety of solutions to the problem, but no plan has received widespread support from courts or legislatures.<sup>354</sup> Because relocation decisions are necessarily fact-specific, some scholars question the likelihood that “any specific test or standard can do justice” in complex relocation decisions.

This proposal attempts to shelter a mother’s interests in seeking a new life in a new location, while protecting a father’s right to have realistic visitation with his child and still allow the courts to bar relocation when it would endanger a child. The proposal recognizes the importance of maintaining a positive father-child relationship but also recognizes that this can usually be accomplished through creative visitation schedules and proactive communication, rather than through an outright prohibition on a mother’s right to relocate. This proposal attempts to be both objective and discretionary and

349. CRITTENDEN, *supra* note 333, at 9.

350. *Id.*

351. *See, e.g., Lane v. Schenck*, 614 A.2d 786, 790 (Vt. 1992).

352. Barry Scholl, Note, *A Matter the Court Should Consider?: The Risk of Relocation and the Custody Conundrum*, 6 J.L. & FAM. STUD. 353, 358–59 (2004).

353. *See* Pfennig, *supra* note 180, at 129.

354. *See, e.g., id.* at 128–29 (suggesting custody decisions should be decided by a three-judge panel instead of by one trial judge to minimize bias).

takes into account many important factors discussed in court opinions, legal scholarship, and psychological research.

A. *Missouri Should Modify the Burden of Proof and the Statutory Scheme for Considering Relocations*

In Missouri, the relocating parent has the burden of proving that the move is in the best interest of the child.<sup>355</sup> Missouri should transpose its burden of proof, allowing a primary custodial parent to move (without judicial intervention) unless the non-relocating parent files a motion to prevent relocation and proves that the move is *not* in the best interests of the child.

If the non-custodial parent files a motion to prevent relocation, the court should decide the case based on a four-step burden-shifting standard. First, the judge should require the relocating parent to prove that the relocation request is made in good faith. If the judge finds that the relocation request is not made in good faith, and is instead an attempt to alienate the non-custodial parent or frustrate visitation, then the court should presumptively deny the relocation request, ending the analysis.<sup>356</sup> If the court, however, finds that the parent's request was made in good faith, it would proceed to step two—determining the best interest of the child.

In step two, the non-relocating parent has the burden of proving that the move is not in the best interest of the child. Rather than allowing the judge unfettered discretion in applying an amorphous “best interests” test, the judge would be required to complete a judicial form that lists the relevant factors to be weighed in a relocation dispute.<sup>357</sup> The form would have a series of statements regarding the relocation request, and the judge could answer by indicating whether, in the context of that specific case, he strongly agreed; agreed; felt neutral; disagreed; or strongly disagreed with the statement. He would also have the option of discarding questions that were not applicable to the current situation. On certain factors, the judge could also indicate the level of importance the factor had in the present dispute; thus judges would be less likely to overemphasize any one factor. When the form was completed, the judge's responses would be calculated, and the score of the calculation would indicate whether the move would fall in one of three potential categories: “would likely be in the child's best interest,” “may or may not be in the child's best interest,” or “likely would not be in the child's best interest.”

If the resulting calculation indicates that the move “would likely be in the best interests of the child,” it creates a rebuttable presumption that the move should be allowed unless the judge rebuts the form by showing that either (1) the presumption was unjust or improper because it did not adequately reflect

355. MO. REV. STAT. § 452.377.9 (2002).

356. See, e.g., Valdespino, *supra* note 99, at 22.

357. See Appendix A, for a suggestion of forms for a court to use in relocation cases.



the best interests of the child, or (2) that the move would endanger the child's health or welfare.

If the calculation indicates that the move "may or may not be in the best interests of the child," it would also create a rebuttable presumption that the move should be allowed, unless the judge rebuts the form. This is because the custodial parent has already been chosen as the primary caretaker, and the law should aim to protect the child's relationship with its primary caretaker and preserve the stability of the original custody determination.

If the calculation indicates that the move would likely not be in the child's best interest, the court would be required to make an additional ruling under step three of the analysis. In step three, the judge would be required to consider which alternative would be the least detrimental to the child. If the move, although problematic, would be a better alternative because it would allow the child to remain in the custody of the primary custodial parent, then the move should be allowed. In contrast, if a child would be better served by living with the non-custodial parent than relocating with the custodial parent, the move should be denied. In effect, the court is deciding whether the child would be better served by moving with the custodial parent or staying with the non-custodial parent.<sup>358</sup>

Additionally, if a judge is unsatisfied that the form has reached the correct result, he may rebut the form in step four, after completing the form and the subsequent analysis.<sup>359</sup> If the judge rebuts the form, he should make findings of fact and conclusions of law explaining why a deviation from the form would be in the child's best interests. This analysis helps preserve the reasoning behind the judge's decision to allow or deny the move and focuses the judge on the factors that should be most important in relocation disputes.

If the relocation is allowed, the court should fashion a visitation schedule that will allow the non-custodial parent a realistic opportunity for contact with the child. The court should also consider implementing the use of technology to foster the child's relationship with the non-custodial parent.<sup>360</sup> As the Missouri Court of Appeals has held in the past, "in this age of high speed travel and common use of communication technology," parties can discuss the child's needs and resolve those needs as effectively as they could if the parents lived in the same city.<sup>361</sup>

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358. See Charles Bauer, *Relocation of Children After Divorce*, ADVOCATE, Jun. 2001, at 12, 13 (citing *Lane v. Schenck*, 614 A.2d 786, 495–96 (Vt. 1992)).

359. Such rebuttable presumptions create continuity in decision-making while recognizing that any situation will likely have "outliers" that do not quite fit in a general scheme. Allowing the court to rebut the presumption when atypical circumstances arise allows for some flexibility in unique circumstances. See Bruch, *supra* note 34, at 294.

360. See, e.g., Gottfried, *supra* note 37, at 475.

361. *McCubbin v. Taylor*, 5 S.W.3d 202, 208 (Mo. Ct. App. 1999).

This reversal of the burden of proof in relocation cases incorporates three major legal doctrines at play in child-custody disputes—doctrines that seek to preserve the continuity and stability of a child’s relationship with his or her custodial parent: (1) that it is generally in the child’s best interests to preserve the status quo regarding custody placement; (2) that there is generally a presumption that physical custody should be awarded to the “primary caretaker” of the child; and (3) that custody placements should only be modified upon a showing of a substantial change of circumstances.<sup>362</sup>

*B. Missouri Should Explicitly Define “Good Faith” as Used in Relocation Disputes as a “Lack of Bad Faith”*

When courts determine whether the custodial parent is seeking to move in “good faith,” they should not, at that point, be determining whether the reasons for moving are in the child’s best interest.<sup>363</sup> Instead, they should be deciding whether the reasons for moving are legitimate, and not made in “bad faith.”<sup>364</sup>

Courts, however, should be mindful that in some situations, a parent’s desire to distance himself or herself from an ex-spouse or ex-lover does not necessarily indicate that she is acting in bad faith.<sup>365</sup> The need to “start a new life” away from bad memories and friends, who only knew the parent as part of a couple, can be compelling.<sup>366</sup> Often women have moved away from their homes and families to a new location determined by the father’s employment.<sup>367</sup> After the demise of the relationship, there may be no real reason for the mother to continue to live near the father, apart from her own family, who could provide a necessary support system after divorce.<sup>368</sup> Putting distance between a high-conflict mother and father can often lessen the frequency and intensity of the conflict.<sup>369</sup> Courts should seek to separate these legitimate reasons for moving from situations where the move is intended solely to interfere with a father’s visitation, or a tactic to harass or annoy him. In determining whether a custodial parent is acting in good faith, the court should not interrogate whether the parent’s reasons for moving are good or bad

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362. See Bruch, *supra* note 34, at 286.

363. See Paige M. Dempsey, Note, *Joint Custody and Relocation: The Supreme Court of Nebraska Limits Relocation of Parents Sharing Joint Custody in Brown v. Brown*, 35 CREIGHTON L. REV. 185, 211–12 (2001) (citing *Jack v. Clinton*, 609 N.W.2d 328 (Neb. 2000)) (discussing how the Nebraska Supreme Court differentiated between a “legitimate” reason for a move from that reason meeting the child’s best interest).

364. *Id.*

365. See Sheehan, *supra* note 176, at 141.

366. *Id.* at 141–42 (noting that a woman’s identity may be partially derived from her husband’s).

367. *Id.* at 141.

368. *Id.*

369. See *supra* notes 366–67 and accompanying text.

reasons. Instead, the court should consider only whether the parent's reasons are a "pretext" for a vindictive motive.

In addition, the court should fashion a remedy for custodial parents who have spent time and money litigating the relocation if the *non-custodial* parent has objected in bad faith. At least one legislative proposal in Missouri has sought to give custodial parents the opportunity to seek attorneys' fees from a non-custodial parent who objects to the relocation in bad faith.<sup>370</sup>

*C. Missouri Should Change the Definition of Relocation to Allow Parents to Move Short Distances without Seeking Judicial Intervention*

Under current Missouri law, custodial parents have to seek permission to move for any move, no matter how close or far away.<sup>371</sup> The better practice would be to define relocation as a fixed number of miles (for example, 150 miles) away from the previous residence. This definition would conform with sound jurisprudence which holds that moves within a reasonable distance should not be deemed a substantial change in circumstances that would trigger a modification in custody.<sup>372</sup>

Under this new system, if a parent sought to move within the 150-mile boundary, he or she would still be required to send notice to the non-relocating parent, advising them of the move, but would not be required to seek permission from the non-custodial parent or court before they could move. If other circumstances besides those generally associated with relocation<sup>373</sup> have changed substantially, the non-relocating parent could seek a modification of custody. This change in definition would prevent mothers like Ms. Osiafrom spending thousands of dollars and waiting several years just to be able to move a short distance away.

*D. Missouri Should Create Evidentiary Rules which Would Prohibit Courts from Forcing Parents to Prove Things They Cannot or Should Not Have to Prove*

Courts should create evidentiary rules that restrain non-relocating parents from attacking the relocating parent's motives for the move based on evidence

370. H.B. 1421, 90th Gen. Assem., 2d Reg. Sess. (Mo. 2000), available at <http://www.house.mo.gov/content.aspx?info=/bills00/biltxt00/intro00/HB14211.htm>.

371. See MO. REV. STAT. §§ 452.377.1, 452.410, 452.411 (2002 & Supp. 2008).

372. See note 58 and accompanying text (citing statutes and cases where other states allow relocations a short distance away, and proposed bills seeking to change Missouri's law accordingly); see also, e.g., *Williams*, 230 S.W.3d at 861 (allowing mother's move because it was only fifty-five miles away and that it would be unrealistic to inflexibly confine her to a geographic area, even though the move was across state lines).

373. Courts should not consider factors generally associated with relocation such as a change in residence, a change in neighborhood, a change in school, etc. as a change in circumstances to justify a modification of custody.

that the relocating parent has failed to obtain an exact address, the exact school or daycare the children will attend, or even a firm offer of employment, if a contingent employment offer appears reasonably calculated to lead to gainful employment. Certainly courts should discourage moves where the custodial parents have failed to undertake any investigation into the new living arrangements and schools. But if a parent comes to court and can offer evidence that, if allowed to move, she would likely live in a certain neighborhood and her children would likely attend a certain school, she should not be penalized for her inability to finalize housing or schooling due to the speculative nature of relocation. Further, the absence of this evidence should have little bearing on the outcome of the case because the trial court has already deemed the custodial parent the more suitable caretaker of the child. Courts should presume that the custodial parent will act in the child's best interest in choosing housing and making child care and educational decisions. Absent evidence that a particular location will *directly harm* a child, this type of evidence is likely irrelevant and unnecessary to an informed relocation decision.

Courts should also limit the ability of custodial parents or non-custodial parents to introduce general statistical evidence about the safety of the city or the "quality" of a city's schools without first requiring the parent to make an offer of proof that the evidence would, more likely than not, have a substantial and observable effect on a child's actual development.<sup>374</sup>

Finally, courts should prohibit parents from introducing evidence indicating whether a custodial parent would in fact move if the court denies the relocation.<sup>375</sup> Barring the introduction of this type of evidence is one further step in limiting the ability of judges to grant contingent custody transfers and to force a mother to make the "Sophie's choice" of relocating or losing custody of her child.<sup>376</sup>

*E. Missouri Should Allow Parents with an Imminent Need to Relocate an Opportunity for a Preliminary Hearing*

The trial court should allow a custodial parent to have a preliminary hearing<sup>377</sup> concerning the move if (1) there is a substantial likelihood that the

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374. See *infra* notes 377–84 and accompanying text.

375. PROPOSED MODEL RELOCATION ACT § 406(b) (Am. Acad. Matrim. Lawyers 1997), available at [http://www.aaml.org/tasks/sites/default/assets/File/docs/publications/Model\\_Relocation\\_Act.htm](http://www.aaml.org/tasks/sites/default/assets/File/docs/publications/Model_Relocation_Act.htm); Duggan, *supra* note 44, at 206 (advocating that this type of evidence be excluded).

376. See Duggan, *supra* note 44, at 206 (arguing that mothers will generally concede that if forced between the move and her child, she would pick her child, and this runs the risk the judge will devalue her reasons for relocating or find her to be a selfish mother).

377. The preliminary hearing should be given higher priority on the court docket than any actions under MO. REV. STAT. § 452.300 et. seq., except adult abuse actions and child abuse

relocating parent would not be able to have both a trial and a ruling before the date the parent must relocate; and (2) if by not getting an affirmative ruling from the trial court before the slated move date, the parent's move would become moot due to an imminent opportunity which could not be delayed.<sup>378</sup>

At the preliminary hearing, the court should have the power to allow the custodial parent to relocate, pending final adjudication on the merits, if:

- (1) The relocating parent can prove the move is not made in bad faith and the move is made for certain bona fide reasons, such as remarriage, employment, educational opportunities, or natural disasters.
- (2) Or there is a substantial likelihood that the relocating parent would prevail at a full hearing;
- (3) Unless the non-relocating parent proves that a temporary move would endanger the health or welfare of the child.

If a parent meets the criteria for a temporary relocation, the court should allow the parent to relocate, realizing, however, that the court has not yet adjudicated the relocation on its merits. Courts should be satisfied that, given the evidence before them, the move would likely be allowed if given a full hearing. The ruling should not be taken lightly, given the drastic changes and costs it would impose upon the family if the child, who has already relocated and started adjusted to a new town and school, was forced to once again move. The move would also impose a great cost upon the parent who would not have decided to move, start a new job, buy a new house, etc., if she knew that the child would not be allowed to accompany her.

This temporary mechanism realizes that, no matter how large of an evidentiary burden a non-custodial father may face in bearing the burden of showing that the move is not in the child's best interest, some mothers may ultimately be prevented from moving by fathers' stall tactics in preventing the case from getting an expedient trial.<sup>379</sup> Unscrupulous parties could certainly request extensive discovery, request extensions for judicial deadlines, and delay the trial process as long as possible to pressure a custodial parent to

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complaints. This type of expedited hearing is already in place for Family Access orders, where parents who have been wrongly denied visitation with their children can seek immediate redress from the courts. *See* Plax & Barrie, *supra* note 60, at 332 (discussing the expedited process for Family Access orders); *see also* PROPOSED MODEL RELOCATION ACT, *supra* note 375, § 402 *Comment* (recognizing proposed relocations often involve time sensitive issues and should be afforded appropriate priority on a court's docket).

378. This mechanism is based loosely off the temporary hearing procedures codified in PROPOSED MODEL RELOCATION ACT, *supra* note 375, § 401(b).

379. *See supra* notes 133–56, 174–75 and accompanying text.

abandon a time-sensitive move.<sup>380</sup> At the same time, it would be unwise to force courts to make final decisions in all relocation cases on an expedited basis.<sup>381</sup> In “close-call” relocation cases, where there is a potential for the relocation to harm the child, the judge should have the benefit of reviewing discovery and evidence, which might not otherwise be obtained if the court were forced to decide the case immediately, before each side could build much of a case.<sup>382</sup> This mechanism creates a middle ground: allowing parents the flexibility to move quickly, while allowing judges the proper amount of time necessary to fully determine whether the move is in the child’s best interests.

In reality, when a court allows a custodial parent to temporarily relocate pending final adjudication, many non-custodial parents may feel pressure to settle the case or withdraw their objections unless they truly felt that the move would be harmful to the child. Consequently, this mechanism has an added bonus of discouraging non-custodial parents from pursuing or continuing with vexatious litigation.

To safeguard the integrity of the preliminary hearing, courts should be allowed to sanction custodial parents who falsify or deliberately conceal material information regarding the relocation at the temporary hearing.<sup>383</sup> In addition, courts should have the option to sanction non-relocating parents who make frivolous objections to legitimate relocation requests which increase the cost of litigation and unduly delay the proceedings.<sup>384</sup>

### 1. Judicial Oversight

One reform needed to improve the integrity of the family court system is implementing a system, though often overlooked, of oversight of the judicial process. Family court judges have some of the most unfettered discretion of any judges in the judiciary.<sup>385</sup> Because the standards in family law cases are so vague, judges are free to decide cases based on any number of personal biases.<sup>386</sup> This is problematic for a variety of reasons. First, it is simply arbitrary to allow one person, who is often overworked<sup>387</sup> and under-informed

380. See *supra* notes 133–56, 174–75 and accompanying text discussing the inherent delays that many parents face in seeking to relocate. When one party obstinately delays the relocation trial, the parent’s move could be prevented for even longer.

381. See Model Relocation Act, *supra* note 61, § 403 cmt. at 17 (“A full evidentiary hearing may be crucial to a relocation determination.”).

382. *Id.*

383. See *id.* § 409.

384. See *id.* (providing for sanctions for unwarranted or frivolous proposals to or objection to relocation of child).

385. See *supra* notes 285–356 and accompanying text (discussing biases).

386. See *supra* notes 185–210 (for vagueness), 285–356 (for biases) and accompanying text.

387. See Plax & Barrie, *supra* note 60, at 332 (recognizing that the family judges in some circuits face enormous caseloads).

of the familial situation<sup>388</sup> and psychological research regarding the placement of children,<sup>389</sup> to decide cases based on his or her gut instincts.<sup>390</sup> Divorce and custody disputes occur at a time when the family is particularly vulnerable. The decisions that the judge makes often decide the whole course of a child's life, create de facto decisions for parents on where to live and where to work, and can often exacerbate depression and conflict.<sup>391</sup> Thus, the integrity of judicial interpretations of family law issues are "not only of basic human importance to the women, men, and children who seek to enforce their rights, but also critical to the public's perception of the courts."<sup>392</sup> Missouri judges regard family law as "lower-status work," and often, unfortunately, a judge's distaste for the type of work is clear to many attorneys who appear before them.<sup>393</sup>

Second, because the standards are vague and arbitrary, even when judges try diligently to decide the case objectively and evenhandedly, their rulings often contribute to a complete lack of consistency in the opinions of courts within the same state, region, or even judicial circuit.<sup>394</sup> It is nonsensical that cases having almost identical facts can result in such different outcomes. The problem is later compounded by appellate courts, which generally defer to the judgment of the trial court unless the judge has abused his or her discretion. What is left is a body of law that is virtually useless to any practitioner.<sup>395</sup> As a Vermont judge succinctly put it:

The lack of standards inhibits appellate review and does not provide the kind of predictability and stability that lawyers and litigants should expect from recent decisions. Without guidelines, we will quickly produce a hodgepodge of decisions with no consistent thread other than "the trial court did not abuse its discretion." The reality of this kind of decision-making is that very similar cases will result in very different decisions, and a custodial parent's ability to relocate will depend on the vicissitudes of individual judges. Because of factual differences in cases, we will always be forced to tolerate some

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388. See Duggan, *supra* note 44, at 196 (stating that judges always know less about what is best for a child than the child's parents).

389. See Charlow, *supra* note 107, at 279 (arguing that although social and psychological research may reveal useful conclusions about the reality of child development in broken families, judges generally do not apply the research to their decisions).

390. See *supra* note 285 and text.

391. See Sheehan, *supra* note 176, at 135.

392. See Task Force on Gender & Justice, *supra* note 154, at 527.

393. *Id.* at 537 n.197 (survey of judges showing 68% believing family law was sometimes, usually, or always regarded as "lower status work"). Judges surveyed overwhelmingly chose juvenile and family law as the least desirable judicial assignment, but most judges had not received juvenile matters within the last five years. *Id.* at 537 n.198.

394. See *supra* notes 178–80, 185–90 and accompanying text.

395. See *supra* notes 207–10 and accompanying text.

inconsistency in decision-making, but we ought not create the circumstances in which it will flourish.<sup>396</sup>

Further, the family court system lacks the transparency for scholars and critics to expediently “catch” the abuse of any particular judge or to ascertain troubling patterns of custody rulings across regions or circuits. In Missouri, there is no “tracking system” where interested parties can review the decisions made by trial judges. Family law cases, at the trial level, are not published on databases like Westlaw or Lexis where one can search by keyword or topic. Individual cases are docketed on the state’s case management system, but the system does not include any substantive information about the litigants and the dispute that would be helpful in gathering statistical information about court rulings.<sup>397</sup> Even if the trial court’s ruling were successfully obtained, it would likely be unhelpful in understanding the basis for the court’s ruling. Although courts are required to make findings of fact in child custody decisions, trial courts often do not do so.<sup>398</sup> When the judges fail to make comprehensive findings of fact, it leaves the party interpreting the order to merely guess why the judge decided the way he did. Therefore, the decision would be of limited use to a researcher.<sup>399</sup>

This current lack of transparency and oversight can allow certain judges to consistently decide cases wrongfully—based on biases<sup>400</sup> or perhaps just plain laziness<sup>401</sup>—with only the remote possibility of being caught and reprimanded.<sup>402</sup> As one government worker put it: “If you’re working for the city and you dump a load of cement in the street, everybody can find out about

396. *DeBeaumont v. Goodrich*, 644 A.2d 843, 857–58 (Vt. 1994) (Johnson, J., dissenting).

397. *See generally* Missouri Case.net, <https://www.courts.mo.gov/casenet/base/welcome.do> (last visited Aug. 1, 2010).

398. *See* MO. REV. STAT. § 452.375.6 (2000) (court order must include written findings detailing specific written factors); *Schlotman v. Costa*, 193 S.W.3d 430, 433 (Mo. Ct. App. 2006) (written findings required in relocation cases). *But see id.* at 433 (remanding case to trial court because it did not make written findings); *Osia v. Osia*, No. 05WA-CC00096-01 (Mo. Cir. Ct. 24th Jud. Cir. Jul. 23, 2007), *aff’d*, 260 S.W.3d 438, 438 (Mo. Ct. App. 2008) (court failed to make written findings and appellate court issued memorandum opinion affirming trial court); *Pastis*, *supra* note 45, at 425 (explaining that findings often are not made).

399. Files kept at local courthouses do not keep copies of exhibits or transcripts of the proceedings. The researcher is left to only know what the trial court has told her about the facts of the case, without the benefit of comparing the judge’s ruling with an actual record.

400. *See supra* notes 285–356 and accompanying text discussing judicial bias; *see also* Task Force on Gender & Justice, *supra* note 155, at 540 (one family law attorney testifies that because judges’ decisions are afforded much discretion on appeal, judges are more likely to follow their own “predilections or biases” rather than apply the law).

401. *See* Task Force on Gender & Justice, *supra* note 154, at 540 (stating that attorneys are often frustrated that family law judges do not keep abreast of new developments in the law and do not follow the law).

402. *See supra* notes 426–30 and accompanying text. *See infra* notes 437–38 and accompanying text



it. But if the same government messes up a child's life, it's secret, and that's why people get away with it."<sup>403</sup> Although there are mechanisms to report judicial misconduct, in family law cases they are not likely to be utilized.<sup>404</sup> In Missouri, once family law litigants have been assigned a judge, they generally are reassigned the same judge for every subsequent modification proceeding.<sup>405</sup> Because of this, litigants are discouraged from reporting judicial misconduct, since they know that the judge will be assigned to any future modifications they seek. Similarly, attorneys are not likely to report judicial misconduct either, since they often have to appear before the same judge, and do not want to risk angering the judge by reporting him or her for judicial misconduct.<sup>406</sup> Since there are few checks and balances on the actions of judges, family law courts have sometimes been termed "kangaroo courts" because they offer little protection to litigants who are wronged.<sup>407</sup>

I propose that the state should create a family court judicial oversight commission which audits trial court rulings.<sup>408</sup> The auditor would randomly compare the outcome of factually similar cases throughout the state, and could report trends to state bar associations and the legislature.<sup>409</sup> If the auditor finds, for example, that certain trial courts are making inconsistent rulings in similar factual scenarios, the auditor could suggest that either the courts or the

403. AMY NEUSTEIN & MICHAEL LESHER, FROM MADNESS TO MUTINY: WHY MOTHERS ARE RUNNING FROM FAMILY COURTS—AND WHAT CAN BE DONE ABOUT IT 205 (2005) (criticizing the secrecy of family court rulings and noting that the results would likely cause public outrage if known).

404. For example, complaints can be made through the Office of Chief Disciplinary Counsel. See Missouri Office of Chief Disciplinary Counsel, <http://www.mochiefcounsel.org/index.htm> (last visited Aug. 1, 2010). There is also the option of voting out poor-quality judges. But this is not likely to be very helpful either. In general, the voting public is unfamiliar with the demeanor and actions of judges well enough to be able to cast an informed vote.

405. MO. SUP. CT. R. 51.05(a); MO. REV. STAT. § 452.410.2 (2000).

406. Based on conversations the author has had with many family law attorneys. See also Task Force on Gender & Justice, *supra* note 154, at 539 (explaining that family law attorneys are often put in an "awkward position of repeatedly appearing before the judge on the case who, in turn, may not only find the assignment distasteful, but may be particularly impatient with a party who is regularly before the court."). But see MO. RULES OF PROF'L CONDUCT 4-8.3(b) (2007) ("A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.").

407. NEUSTEIN & LESHER, *supra* note 403, at 28.

408. The Missouri State Auditor is responsible for auditing courts for fiscal and budgetary matters. However, there is no indication the Auditor, or any other authority, randomly reviews courts for substantive legal-related problems. See Missouri State Auditor's Office, <http://www.auditor.mo.gov/auditreports/courts.htm> (last visited Sept. 24, 2009).

409. See NEUSTEIN & LESHER, *supra* note 403, at 216–17 (recommending a special commission to review case decisions of sitting family court judges; recommending the commissions consist of judges, psychologists, and laypersons; and recommending the commission release annual reports).

legislature create procedural or substantive rules to guide trial court judges. Likewise, the auditors would be looking for individual biases from judges. If a judge, for example, heard many relocation cases, and never allowed one—even in varying factual situations—the judge should likely be investigated for lack of impartiality. In the same respect, if it is obvious that a particular judge has made clearly biased statements and issued discriminatory rulings to litigants, state disciplinary authorities should also investigate the judge. This system would serve as an important check on the authority of judges, and provide a vital way to ensure that cases are being decided fairly and consistently across the state.

## 2. Benefits

As one judge has put it:

The law pretends that we can determine with some high degree of predictive accuracy whether a move . . . will be in a child's best interest—we can't. The truth is this: there is no evidence that our decisions in these types of cases result in an outcome that is any better for the child than if the parents did rock-paper-scissors.<sup>410</sup>

Any custody trial is corrosive to a family, but in relocation disputes, the worst aspects of custody trials are multiplied.<sup>411</sup>

Maintaining predictability and balance in trial judges' rulings has been a widely recognized problem.<sup>412</sup> At the same time, most commentators and judges have emphasized that all custody disputes are different. This system would reduce the amount of relocation litigation and would expedite the process of time-sensitive relocation trials. Such a system would discourage prolonged conflict between the parents and satisfy concerns about children's sense of urgency and the need for continuity, while allowing the court to prevent relocations that would be detrimental to a child.<sup>413</sup>

Requiring the non-custodial parent to bear the burden of proving that relocation is not in the best interest of the child is consistent with the principal that once a custodial parent has been deemed a fit caretaker, courts should not modify the custody arrangement unless a significant change in circumstances has occurred. In today's mobile society, most relocations simply should not qualify as a significant enough change to reverse custody. Deferring to the

410. Duggan, *supra* note 44, at 193; See also Comment, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 153–54 (1963) (arguing that the standard may disguise mere "judicial intuition").

411. Duggan, *supra* note 44, at 194.

412. See Tracia, *supra* note 35, at 166 (discussing the problems with Massachusetts' relocation law); *Baures v. Lewis*, 770 A.2d 214, 228 (N.J. 2001) (recognizing unpredictability and lack of guidance to trial judges in New Jersey's old relocation statute).

413. See Charlow, *supra* note 107, at 284.

judgment of the custodial parent prevents “the vexation and expense [of defending] . . . unjustified lawsuits, conserves judicial resources, and fosters reliance on judicial actions by minimizing the possibility of inconsistent decisions.”<sup>414</sup>

Allowing courts to micromanage the day-to-day decisions parents make about their careers and families may cause parents constant stress about how their decisions will be perceived by a detached judge and may change the way the parents make parenting decisions. It also furthers the possibility that parents will be exposed to unnecessary litigation simply because they seek to move.<sup>415</sup> In corporate law, courts use the “business judgment rule” to presume that corporate directors are acting in the best interests of their corporation and the court will only scrutinize directors’ decisions if they have violated a duty of care. In effect, the courts have recognized that the directors, not judges, know more about what is necessary to run a successful business and courts are loathe to second guess the business decisions of corporate directors. In family law, the same holds true for the decisions of intact parents.<sup>416</sup> When parents are divorced or unmarried, however, Missouri courts apparently no longer assume that parents are capable of keeping the child’s best interests in mind, and instead force judges, rather than the parents, to make major decisions regarding the child. In these situations, courts should apply what I call the “family judgment rule” to presume that the decisions made by a custodial parent are made with the family’s best interest in mind unless the custodial parent is clearly acting in bad faith or in a way that is likely to endanger a child. Since mothers generally bear the brunt of a child’s day-to-day care, requiring fathers

414. Cocus, *supra* note 44, at 111.

415. *Id.* (citing *In re Marriage of Burgess*, 913 P.2d 473, 481 (Cal. 1996)) (explaining that pressuring parents to not relocate would undermine the court’s interest “in minimizing costly litigation over custody and require the trial courts to “micromanage” family decision-making by second-guessing reasons for everyday decisions about career and family.”).

416. *Parham v. J.R.*, 442 U.S. 584, 602–03 (1979).

Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course. . . . The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. . . . That some parents “may at times be acting against the interests of their children” . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child’s best interests. . . . The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition. . . . Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.

*Id.* (citations omitted).

to show that relocation would harm the child maintains the continuity of care the child has with its primary caretaker, the mother, while allowing the court the flexibility to prevent bad faith and detrimental relocations.<sup>417</sup> Changing the burden of proof is not enough to protect the interests of the custodial parent and the child.<sup>418</sup> Just as shareholders are discouraged from suing corporations if they know they will be met with the business judgment rule, in family law, the non-custodial parent, facing a heavy burden, would also be less likely to pursue litigation unless he or she truly believed that preventing relocation would be in the best interests of the child.<sup>419</sup> But in relocation cases, there is often an added wrinkle: time-sensitivity. The litigation process is slow, and significant delays in relocation can prevent parents from obtaining a job or an educational opportunity that served as the basis of their relocation requests. Unscrupulous non-custodial parents may, for that very reason, contest relocations for frivolous reasons, even if they are “unqualified for or uninterested in obtaining custody.”<sup>420</sup> For this reason, there must be a procedure in place to ensure that parents faced with time-sensitive relocations can seek expedited hearings.

Loving parents should not be treated like criminals, shackled to their past homes and communities merely because they want to build a better life for themselves and their children.<sup>421</sup> To be sure, “an award of custody to a parent should [not] be interpreted as a sentence to immobilization.”<sup>422</sup> As other authors have noted, denying a mother the right to relocate with her children is, in many ways, putting her under house arrest.<sup>423</sup> And for all the social costs that the law imposes upon a mother and her new family unit, the relocation law cannot even meet its implied purpose of “simulating unity.” In sum,

A rule of law that effectively requires custodial parents to gamble custody of the children before they can live with their children and new spouses . . . while imposing no similar limitations on noncustodial parents who profess to be “highly involved” in the lives of their children—seems the very antithesis of domestic stability. It is also grossly unfair.<sup>424</sup>

417. Sheehan, *supra* note 176, at 148; *see generally* Bruch, *supra* note 34, 281–94.

418. *Contra* Cocus, *supra* note 46, at 103 (“[A]ll that is needed is a simple shift in the burden of proof.”).

419. *Id.* at 111.

420. Bruch & Bowermaster, *supra* note 39, at 248.

421. “Our precedent has essentially placed custodial parents in the untenable position of being prisoners in the state . . .” *Hollandsworth v. Knyzewski*, 79 S.W.3d 856, 864 (Ark. Ct. App. 2002) (Bird, S., concurring).

422. *Gottschall v. Gottschall*, 316 N.W.2d 610, 612 (Neb. 1982); *In re Marriage of Dusing*, 654 S.W.2d 938, 942 (Mo. Ct. App. 1983) (“Provisions for a relationship with both parents can be made other than by confining the wife’s residence to Butler County.”).

423. LaFrance, *supra* note 54, at 94.

424. *Hollandsworth v. Knyzewski*, 79 S.W.3d at 873.

## CONCLUSION

About every ten years, most states dramatically reverse the course that they have taken in relocation disputes.<sup>425</sup> Missouri's current relocation statute was implemented in 1998.<sup>426</sup> For the last twelve years, Missouri has developed a body of relocation law that establishes no clear guidelines and makes it tremendously difficult for custodial parents to move with their children. Missouri's time has come: it is time to break free from an outdated system that confines women to the immediate geographical area of their ex-lovers, and move toward a system that recognizes the realities of today's modern mobile society. When a relationship ends, by definition, things cannot stay the same and adults should realize the access to their children will necessarily change. It is unrealistic and naïve for courts or former partners to assume that separated parents will continue to live in the same area indefinitely. Regardless of life changes, a custodial parent, found by the court to be a suitable caretaker, is no less capable of being a responsible parent merely because he or she has requested to relocate. Courts should not penalize mothers for seeking to improve their lives by relocating. This proposal for change seeks to protect mothers' right to relocate, while preserving a father's relationship with his children, and once implemented, would bring consistency, fairness, and judicial oversight to relocation decisions. Although, as Balzac once stated, "Maternal love makes of every woman a slave,"<sup>427</sup> it is time for Missouri to unlock the shackles that restrain women to the vicinity of their former partners and allow mothers the opportunity to pursue their goals and dreams.

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425. PHILIP M. STAHL & LESLIE M. DROZD, *RELOCATION ISSUES IN CHILD CUSTODY CASES* 4 (2006).

426. Plax & Barrie, *supra* note 60, at 328.

427. CRITTENDEN, *supra* note 333, at 8.

\* J.D. Candidate, Saint Louis University, 2010; B.S. & B.A., Southeast Missouri State University, 2006. I give my thanks to Professor Molly Walker Wilson for her guidance, suggestions, and encouragement as I prepared this Comment. I would also like to thank my mom and dad, Barbara and Larry Hixson, for their unwavering love and support, and my daughter, Aubrianna, who inspired this Comment. Finally, I thank my husband, Joe Lambson, who inspires me every day and who has stood by my side through all of life's struggles. I dedicate this article to all the women who put their own lives on hold, and who sacrifice their own goals and dreams, just to be able to live with their children. I can only hope that one day we will no longer require them to make such sacrifices.

## Child Relocation Decision-Making Tool

### Initial Presumptions:

1. **International Moves.** This test is not intended to be used when the contemplated move is an international move. International moves incorporate three potential concerns that are not at issue in domestic relations: the problem of retaining jurisdiction of the child and that the custody order will be honored; the problem of fashioning a reasonable visitation schedule when the distance is so great; and the problem that the cultural conditions of the country may put the child at risk. *See generally* Lawrence Katz, *When the Question Involved An International Move: The Answer May Lie in Retaining U.S. Jurisdiction*, 28 SPG Fam. Advoc. 40 (2006). Courts should devise their own standards for evaluating international relocation cases.

2. **Domestic Violence / Restricted Custody.** This test is not intended to be used when the non-custodial parent has supervised visitation privileges, or has committed violence against the custodial parent or the child. It should presumably never be in the child's interest to change custody to the non-custodial parent under these circumstances. *See generally* Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, 46 U. Kan. L. Rev. 433 (1998).

### Instructions:

Fill out the following form as directed. Consult the interpretive notes and comments to clarify each factor.

#### Step 1: Motive of Custodial Parent's Move

I believe the custodial parent has a

- ☐ good faith  
☐ bad faith      reason for seeking to relocate.

That reason is:

Enter reason here.

- If the reason is a good faith reason, go to Step 2.
- If the reason is a bad faith reason, this analysis is over and the relocation should be presumptively denied.

**Step 2: Best Interest of the Child Factors****1. The non-custodial parent has been actively involved in the child/children's life.<sup>1</sup>**

- |   |                                      |  |
|---|--------------------------------------|--|
| <input type="radio"/> strongly disagree | <b>How Important is this Factor?</b> | <input type="radio"/> very important     |
| <input type="radio"/> disagree          |                                      | <input type="radio"/> somewhat important |
| <input type="radio"/> neutral           |                                      | <input type="radio"/> neutral            |
| <input type="radio"/> agree             |                                      | <input type="radio"/> not important      |
| <input type="radio"/> strongly agree    |                                      | <input type="radio"/> not applicable     |

**2. The non-custodial parent has been responsible in financially supporting the child/children.<sup>2</sup>**

- |   |                                      |  |
|---|--------------------------------------|--|
| <input type="radio"/> strongly disagree | <b>How Important is this Factor?</b> | <input type="radio"/> very important     |
| <input type="radio"/> disagree          |                                      | <input type="radio"/> somewhat important |
| <input type="radio"/> neutral           |                                      | <input type="radio"/> neutral            |
| <input type="radio"/> agree             |                                      | <input type="radio"/> not important      |
| <input type="radio"/> strongly agree    |                                      | <input type="radio"/> not applicable     |

**3. If relocation is allowed, the court can fashion an alternative visitation schedule which will promote and foster the non-relocating parent's relationship with the child/children.<sup>3</sup>**

- |   |                                      |  |
|---|--------------------------------------|--|
| <input type="radio"/> strongly disagree | <b>How Important is this Factor?</b> | <input type="radio"/> very important     |
| <input type="radio"/> disagree          |                                      | <input type="radio"/> somewhat important |
| <input type="radio"/> neutral           |                                      | <input type="radio"/> neutral            |
| <input type="radio"/> agree             |                                      | <input type="radio"/> not important      |
| <input type="radio"/> strongly agree    |                                      | <input type="radio"/> not applicable     |

**4. The non-custodial parent has the ability to relocate with the child/children to the new town.<sup>4</sup>**

- |   |                                      |  |
|---|--------------------------------------|--|
| <input type="radio"/> strongly disagree | <b>How Important is this Factor?</b> | <input type="radio"/> very important     |
| <input type="radio"/> disagree          |                                      | <input type="radio"/> somewhat important |
| <input type="radio"/> neutral           |                                      | <input type="radio"/> neutral            |
| <input type="radio"/> agree             |                                      | <input type="radio"/> not important      |
| <input type="radio"/> strongly agree    |                                      | <input type="radio"/> not applicable     |

**5. If allowed to move, the relocating parent will likely cooperate to comply with the newly fashioned visitation order.<sup>5</sup>**

- |   |                                      |  |
|---|--------------------------------------|--|
| <input type="radio"/> strongly disagree | <b>How Important is this Factor?</b> | <input type="radio"/> very important     |
| <input type="radio"/> disagree          |                                      | <input type="radio"/> somewhat important |
| <input type="radio"/> neutral           |                                      | <input type="radio"/> neutral            |
| <input type="radio"/> agree             |                                      | <input type="radio"/> not important      |
| <input type="radio"/> strongly agree    |                                      | <input type="radio"/> not applicable     |

**6. The non-custodial parent's motives in resisting the relocation are based on improper motives.<sup>6</sup>**

- |   |                                      |  |
|---|--------------------------------------|--|
| <input type="radio"/> strongly disagree | <b>How Important is this Factor?</b> | <input type="radio"/> very important     |
| <input type="radio"/> disagree          |                                      | <input type="radio"/> somewhat important |
| <input type="radio"/> neutral           |                                      | <input type="radio"/> neutral            |
| <input type="radio"/> agree             |                                      | <input type="radio"/> not important      |
| <input type="radio"/> strongly agree    |                                      | <input type="radio"/> not applicable     |

**7. The move will have substantial benefits to the custodial parent.<sup>7</sup>**

- |   |                                      |  |
|---|--------------------------------------|--|
| <input type="radio"/> strongly disagree | <b>How Important is this Factor?</b> | <input type="radio"/> very important     |
| <input type="radio"/> disagree          |                                      | <input type="radio"/> somewhat important |
| <input type="radio"/> neutral           |                                      | <input type="radio"/> neutral            |
| <input type="radio"/> agree             |                                      | <input type="radio"/> not important      |
| <input type="radio"/> strongly agree    |                                      | <input type="radio"/> not applicable     |

**List the benefits:**

**8. The relocation will likely enhance the quality of life of the child/children.<sup>8</sup>**

- |   |                                      |  |
|---|--------------------------------------|--|
| <input type="radio"/> strongly disagree | <b>How Important is this Factor?</b> | <input type="radio"/> very important     |
| <input type="radio"/> disagree          |                                      | <input type="radio"/> somewhat important |
| <input type="radio"/> neutral           |                                      | <input type="radio"/> neutral            |
| <input type="radio"/> agree             |                                      | <input type="radio"/> not important      |
| <input type="radio"/> strongly agree    |                                      | <input type="radio"/> not applicable     |

**List the benefits:**



**9. The parties can afford the transportation costs associated with the relocation, taking into account alternative ways of allocating transportation expenses.<sup>9</sup>**

- |   |                                      |  |
|---|--------------------------------------|--|
| <input type="radio"/> strongly disagree | <b>How Important is this Factor?</b> | <input type="radio"/> very important     |
| <input type="radio"/> disagree          |                                      | <input type="radio"/> somewhat important |
| <input type="radio"/> neutral           |                                      | <input type="radio"/> neutral            |
| <input type="radio"/> agree             |                                      | <input type="radio"/> not important      |
| <input type="radio"/> strongly agree    |                                      | <input type="radio"/> not applicable     |

**10. The child has expressed a preference in remaining with the custodial parent and/or relocating with the custodial parent, if the child is of sufficient age and maturity to express a preference.<sup>10</sup>**

- |   |                                      |  |
|---|--------------------------------------|--|
| <input type="radio"/> strongly disagree | <b>How Important is this Factor?</b> | <input type="radio"/> very important     |
| <input type="radio"/> disagree          |                                      | <input type="radio"/> somewhat important |
| <input type="radio"/> neutral           |                                      | <input type="radio"/> neutral            |
| <input type="radio"/> agree             |                                      | <input type="radio"/> not important      |
| <input type="radio"/> strongly agree    |                                      | <input type="radio"/> not applicable     |

**11. The move will allow the child to maintain their relationships with other close family members such as siblings, grandparents, aunts/uncles, and cousins.<sup>11</sup>**

- |   |                                      |  |
|---|--------------------------------------|--|
| <input type="radio"/> strongly disagree | <b>How Important is this Factor?</b> | <input type="radio"/> very important     |
| <input type="radio"/> disagree          |                                      | <input type="radio"/> somewhat important |
| <input type="radio"/> neutral           |                                      | <input type="radio"/> neutral            |
| <input type="radio"/> agree             |                                      | <input type="radio"/> not important      |
| <input type="radio"/> strongly agree    |                                      | <input type="radio"/> not applicable     |

**The relocation “best interest” score is: \_\_\_\_.**

**The relocation:**

- ☐ is likely in the best interests of the child
- ☐ may or may not be in the best interests of the child
- ☐ is likely not in the best interests of the child

**Step 3: The Least Detrimental Alternative**

If the relocation is presumptively not in the best interests of the child, would it be more detrimental to the child to change custody than it would be for the child to relocate with the custodial parent?

- ☐ more detrimental to change custody
- ☐ more detrimental to relocate with custodial parent

List Reasons Why:

**Step 4: Should the Presumptions Be Rebutted**

Should the presumption that the relocation is in the best interests of the child be rebutted?

- ☐ yes
- ☐ no

If no, the inquiry is over and the relocation should be granted.

If yes, is:

- ☐ the calculation unjust or improper because it does not adequately reflect the best interests of the child
- ☐ the move is likely to endanger the health or welfare of the child

If the presumption is rebutted, findings of fact and conclusions of law must be made regarding why the presumption should be rebutted.

## COMMENTS AND INTERPRETIVE NOTES:

1. If the non-custodial parent has not been actively involved in the child's life, the court should typically allow the custodial parent to move rather than considering transferring custody to the non-custodial parent. This includes non-custodial parents who have been granted extensive custody time and failed to exercise it, or non-custodial parents who have shown little or no interest in pursuing extensive custody time with the child. This also would include non-custodial parents whose history of exercising custody of the child is sporadic (i.e., the parent may be highly involved in the child's life for two months and then disappear for five months). The court should also consider if the non-custodial parent only started to be actively involved in the child's life after being notified of the custodial parent's prospective relocation.

- This assumption ensures that the parent who has been actively involved in the child's life will be able to remain with the child. This assumption also prevents non-involved parents from forcing the other parent into settlement concessions—such as the payment of less child support in return for the parent being able to move. It also prevents non-custodial parents who seek to “control” of the mother and the child, rather than maintaining a parental relationship with the child, is not allowed to veto a move by the parent who is cultivating a parental relationship. It also follows the psychological research that “Non-resident fathers who are not highly motivated to enact the parental role or who lack the skills to be effective parents are unlikely to benefit their children, even under conditions of regular visitation.” Amato & Gilbreth, *supra* note 88, at 569.
- See *Cullison v. Thiessen*, 51 S.W.3d 508, 512 (Mo. Ct. App. 2001) (considering the father's distant relationship and his sporadic and inconsistent visitation as a factor weighing against him); Proposed Model Relocation Act § 405 (American Academy of Matrimonial Lawyers 1997) (taking into consideration the “nature, quality, extent of involvement and duration of the relationship of the child with each parent”); Richards, *supra* note 55, at 283; Valdespino, *supra* 99, at 22.

2. If the non-custodial parent has a history of being delinquent in, or altogether failing to pay court ordered child support or other child related expenses (i.e., medical bills), because of either financial burdens or ideological reasons, the court should typically allow the custodial parent to move rather than considering transferring custody to the non-custodial parent.

- The reality is that it generally costs more to raise a child than a parent is receiving in child support payments. If a parent cannot afford to make timely child support payments, a court should assume that they

also would have the financial inability to pay for the normal household expenses of the child. Likewise, if the non-custodial parent is either neglecting his court ordered support duty or willfully avoiding the obligation, the court should be concerned about transferring custody to the parent since the parent has shown disrespect for the authority of the court and a disregard for child's well being.

- See, e.g., Richards, *supra* note 55, at 267 & n.122; La. Rev. Stat. Ann. § 9:355.12(9) (Supp. 2007).

3. La. Rev. Stat. Ann. § 9:355.12(3) (Supp. 2007) ("The feasibility of preserving a good relationship between the nonrelocating parent and the child through suitable visitation arrangements . . ."). See Proposed Model Relocation Act § 405 (American Academy of Matrimonial Lawyers 1997); Richards, *supra* note 55, at 283; Valdespino, *supra* note 99, at 22–23; "A reasonable schedule of visitation is one that provides a satisfactory basis for preserving and fostering a child's relationship with the non-custodial parent" even if it reduces the total number of visitation days. Farnsworth v. Farnsworth, 597 N.W.2d 592, 599 (Neb. 1999).

4. See, e.g., La. Rev. Stat. Ann. § 9:355.12(10) (Supp. 2007).

5. Proposed Model Relocation Act § 405 (American Academy of Matrimonial Lawyers 1997); Richards, Proposed Model Relocation Statute, *supra* note, at 283. A parent's past behavior of denying visitation may show an unwillingness to cooperate with a court plan if they move outside the jurisdiction. But a parent's willingness to offer the other parent a generous visitation plan, offer alternative ways for the non-custodial parent to keep in touch with the child, such as virtual communication, telephone calls, and drop-in visits, the parent's motives in seeking to relocate are likely pure and the parent will mostly likely cooperate to make sure the non-custodial parent is given the opportunity to be involved in the child's life, despite the relocation. But if a judge foresees problems with a parent failing to comply with the custody order after the relocation, requiring the parent to post a bond to secure compliance may alleviate concerns that the custodial parent will frustrate the other parent's visitation rights. See Valdespino, *supra* note 99, at 24. See also Cullison v. Thiessen, 51 S.W.3d 508, 512 (Mo. Ct. App. 2001) (considering the mother's willingness to allow frequent and meaningful contact with the father as a factor weighing in favor of the move).

6. Sometimes a non-custodial parent's reason for opposing the litigation is for an improper motive, such as using his power to delay the relocation as a tactic to reduce his child support. See Ford, *supra* note 69, at 11; Richards, *supra* note 55, at 267. In other cases, a non-custodial parent may oppose the

move as a way of seeking to exert control over his ex-wife. *See* Ford, *supra* note 69, at 11; Richards, *supra* note 55, at 267.

- *See* La. Rev. Stat. Ann. § 9:355.12(7) (Supp. 2007); Proposed Model Relocation Act § 405 (American Academy of Matrimonial Lawyers 1997); Wallerstein & Tanke, *supra* note 38, at 319–21.

7. La. Rev. Stat. Ann. § 9:355.12(6) (Supp. 2007); Proposed Model Relocation Act § 405 (American Academy of Matrimonial Lawyers 1997) (“Whether the relocation of the child will enhance the general quality of life for both the custodial parent seeking the relocation and the child, including but not limited to financial or emotional benefit and educational opportunity.”). *See* Cullison v. Thiessen, 51 S.W.3d 508, 512 (Mo. Ct. App. 2001) (considering the mother’s option of being able to work from home and spend more time with the children if allowed to move as a factor weighing in favor of relocation); Abernathy v. Meier, 45 S.W.3d 917, 924 (Mo. Ct. App. 2001) (the custodial parent’s economic, emotional, and physical well-being are important factors to consider); Valdespino, *supra* note 99, at 23–24. Some of the benefits could include an increase in the parent’s income, better employment opportunity for the parent, better housing conditions, educational improvement, closer access to a support system such as family relatives. *See* Farnsworth v. Farnsworth, 597 N.W.2d 592 (Neb. 1999).

8. *See, e.g.,* Cullison v. Thiessen, 51 S.W.3d 508, 512 (Mo. Ct. App. 2001) (considering the community, school, and recreational benefits to the children as a factor weighing in favor of the move); Proposed Model Relocation Act, *supra* note 375, § 405 (American Academy of Matrimonial Lawyers 1997); Richards, *supra* note 55, at 283; Valdespino, *supra* note 99, at 23–24.

9. *See* Valdespino, *supra* note 99, at 23.

10. *See* Cullison v. Thiessen, 51 S.W.3d 508, 512 (Mo. Ct. App. 2001) (considering the children’s desire to remain with their mother as a factor weighing in favor of the move); Becker v. Becker, 745 S.W.2d 229 (Mo. App. 1987) (changing custody from mother to father where mother moved to take new job and teenage children preferred to live with father since they had friends, relatives, and school-related events they enjoyed in the area); Proposed Model Relocation Act, *supra* note 375, § 405; Richards, *supra* note 55, at 123, 283; Valdespino, *supra* note 99, at 23; Pfenning, *supra* note 180, at 129; Wallerstein & Tanke, *supra* note 38, at 323; Mass. Gen. Laws Ann. Ch. 208, § 30 (child over age fourteen must consent to relocation or court must grant permission upon good cause); Emery et al. *supra* note 285. *See generally* Gary A. Debele, *A Children’s Rights Approach to Relocation: A Meaningful Best Interests Standard*, 10 J. Am. Acad. Matrim. Law 75 (1998). *But cf.* Ford, *supra* note 69, at 52 (arguing that if parents in intact families can make moves

affecting their children without judicial intervention, then the court should value the custodial parent's decision to move over the child's desire to stay).

11. *See* Cullison v. Thiessen, 51 S.W.3d 508, 512 (Mo. Ct. App. 2001) (considering the children's close relationship with other household members, including their half-brother and mother's new husband, as a factor weighing in favor of the move).

- After assessing whether a relocating parent's move is made in good faith, and attempting to assess the best interest factors, a judge may rebut the form if relocation would endanger a child's mental, emotional, or physical health.
- Endangering a child's mental, emotional, or physical health is more than just the trauma that would be associated with any move. This factor is likely met if the child has a very strong relationship with the non-custodial parent and relocation would severely strain that relationship. *See* Ford, *supra* note 69, at 47–49 (discussing Kentucky's endangerment standard); *see also* Wallerstein & Tanke, *supra* note 38, at 319 (supporting the idea that court's should protect a child's most important relationship, and sometimes that relationship may be with the non-custodial parent); Richards, *supra* note 55, at 263–64 (noting that sometimes the non-custodial parent is the primary "psychological parent" and separating the child from that parent may be detrimental). It may also occur if the relocation is a considerable distance away and the child is of an age that would effectively prevent the non-custodial parent from maintaining visitation with the child for a long span of time (until the child reaches an age where long periods of visitation time would be appropriate), and there are not other compelling reasons why the relocation should be granted. It may also occur if the relocating parent has bona fide reasons for a move, but the child has a health condition that necessitates stability or close proximity to certain medical facilities. *See* Ky. Rev. Stat. Ann. § 403.340(3)(a),(b),(c) (instructing that relocation should be denied if it would fundamentally alter the relationship between the child and the non-custodial parent in a way that would threaten mental or emotional harm to the child—because the cumulative benefits of changing custody from the custodial parent to the non-custodial parent would outweigh the harm caused); Richards, *supra* note 55, at 265, 282; Terry, *supra* note 84, at 184 (giving examples of situations where relocation could jeopardize the well-being of the child, including (1) relocating a child with a serious medical condition to an area where adequate treatment is unavailable; (2) relocating a child with special

needs to an area without adequate educational opportunities tailored to the child's needs; or (3) relocating to a residence of a confirmed child abuser).

- *Example 1:* Mother A, the primary parent, seeks to relocate from Texas to Michigan with her three-month-old child. The parent's marriage ended shortly before the child was born. Father loves the child, and visits the child as much as he can, but the child does not spend overnights with the father due to the child's young age. Mother's reason for relocating from Texas to Michigan is because she has found a job there that has the same hour requirements, but pays \$1.50 more per hour. Other than this job, there are no other compelling reasons for the relocation. There is no reason to believe the father would not be an adequate caretaker. The court should not grant the relocation, and should grant custody to father if mother chooses to relocate. If mother stays, she may retain primary custody of the child. Obviously neither choice is optimal—if the mother moved to New York, there is virtually no way to fashion a visitation agreement where the child could have a relationship with the father for at least several years, due to the child's young age and the great distance. Nor is it optimal for the child to suddenly live apart from its primary caretaker to live with a parent who has had little opportunity to attach with the child. The court should force the mother to make the Sophie's choice of choosing to stay and retain custody of the child, or to relocate and change custody to the child's father. While, depending on other facts, this relocation may have been allowed if the child were a few years older and could tolerate extended periods of visitation, or if the mother had a very compelling reason for the move—despite the disadvantages to the father, it should be discouraged in this context because of the limited benefits of the move and the severe consequences of totally cutting off a relationship with the father for several years.
- *Example 2:* Mother B, the primary parent, seeks to relocate 200 miles away to pursue a career advancement opportunity that would give her a promotion and a raise. Mother and Father have both been involved in the child's life, and there is no reason to believe that the father would not be an adequate caretaker for the child. Child has autism and there is compelling evidence that even minor changes in the child's life causes the child severe anguish and causes the child to regress. In other words, the child has a medical need for stability. Certainly, it would not be in the child's best interest to relocate. Nor would it be in the child's best

interest for the court to change custody to father—this too would exacerbate the child’s medical condition. This is a prime example of a situation where a court should seek to discourage the relocation. The court should force the mother to make the Sophie’s choice. The court should not allow the relocation, and threaten to change custody to father if the mother chooses to move. If the mother chooses to stay, she may retain primary custodian of the child. If she chooses to relocate anyway, despite the convincing evidence that her child will be severely harmed, the court has probably made the right decision to change custody to the father, even if it is not the optimal choice. The mother’s decision to move to the severe detriment of the child would indicate that she does not sincerely act in the child’s best interests.

- *Example 3:* Child C is 8 years old and has a rare genetic disorder that requires her to undergo frequent hospital stays, and requires the expertise of highly specialized doctors. Mother C, and Father C divorced when the child was 3. Mother C has primary physical custody, and Father C has visitation every other weekend, extended summer visitation, and visitation over certain holidays. There is no reason to believe father would not be an adequate caretaker of the child. Mother C remarried a year after her divorce, and her and Stepfather C have two children of their own from this marriage—Child C’s half-siblings. Stepfather C’s mother is elderly and has lived alone, but has recently been diagnosed with Alzheimer’s and can no longer live alone and care for herself. Stepfather C seeks to relocate with his wife and children to the town where his mother lives—a rural area. The town is 45 miles from the nearest hospital and that hospital lacks the medical equipment and specialized doctors needed to assist with Child C’s condition. Although this situation is tough, Mother C has a very compelling reason to move, the court should discourage the move and force her to make a Sophie’s Choice. If she stays, she can retain primary custody of Child C, but if she relocates Father C will be awarded primary physical custody. Although it is likely not optimal for Child C to change primary caregivers, her very specific health conditions necessitate her staying within close proximity to the specialized medical facilities she needs. Although this situation is arguably one of the most difficult ones, the court should discourage the move. *See* *Hollandsworth v. Knyzewski*, 79 S.W.3d 856, 863 (Ark. 2002) (Pittman, J. concurring) (“[I]n the case of a child suffering from a



serious medical condition, ready access to appropriate health care facilities may be an overriding concern.”).

- Situations where the best interest factors would necessitate changing custody to father, but moving with the mother would not “endanger” the child’s welfare.
  - *Example 1:* Mother D and Father D divorced when child was 12. They both are adequate and competent parents. Both parents have been highly involved in the child’s life and the child has a strong connection to them both. Both parents live in the same town and in the same public school district. Child D is now 16 and has just started her senior year of high school, where she has attended her whole life. Child D is academically advanced, is taking AP courses, and is highly involved in sports and other extracurricular activities. Mother D’s employer has merged with another company and is eliminating her position her geographic market. They have, however, offered Mother D an opportunity to take a position in another metropolitan area 300 miles away. The position raises Mother D two levels and almost doubles her salary. In order to take this position, mother must move immediately and cannot postpone the move. If she does not take the opportunity, she will lose her job. Going through the court’s analysis, the mother obviously has a good faith reason for the move. In step two, the court analyzes the best interest factors and finds that given the child’s age, the distance of the move, the child’s close relationship with both parents, and the child’s significant interest in finishing her last year of high school in the school she has attended her whole life, the court decides the relocation is not in the best interests of the child. Going to step 3, although Child D would not be “endangered” by moving with her mother, the move would be very traumatic her for. Although Child D could arguably adjust to the move, and although her mother is an adequate caretaker, the court should probably find that the detriment of the move is not outweighed by the benefit of remaining with her primary caretaker. The court should transfer custody to the father if the mother moves. By remaining with father, she would be able to complete her last year of high school without interruption.

