

**MINNESOTA'S CUSTODY RELOCATION DOCTRINE:
IS THERE A NEED FOR CHANGE?**

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I. INTRODUCTION

This article is about children, the decision by a custodial parent with sole physical custody of a minor child or children to relocate in another state following divorce, and Minnesota's response to the relocation request. It compares Minnesota's relocation doctrine with that of several other jurisdictions and examines the competing views of experts on the impact relocation has on children. The article discusses Minnesota's relocation history, its use of presumptions, and constitutional issues involving relocation. It also touches upon other factors that impact relocation such as gender politics and significant social changes that have occurred during the last quarter century. Finally, the article concludes with the suggestion that the impact of recent social changes, doctrinal confusion among courts throughout the nation, and disagreement among experts are so compelling that Minnesota's Legislature should review the relocation issue.

It is old news that the American family is having difficulty. Of greatest concern are the children and the possible detrimental impact recent social changes have had on them. These changes,

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including no-fault divorce and the lack of stigma attached to having children outside of marriage, have generated huge numbers of broken homes, driven both parents in large numbers to find work at jobs outside the home, and encouraged single-motherhood.

Today's family problems have attracted considerable attention from legislatures, Congress, courts, politicians and others. Former President Bill Clinton, for example, evinced concern over the potential harmful impact that fatherless families have on children. In a 1995 speech, Mr. Clinton said:

The single biggest social problem in our society may be the growing absence of fathers from their children's homes, because it contributes to so many other social problems Without a father to help guide, without a father to care, without a father to teach boys to be men and to teach girls to expect respect from men, it's harder.¹

Statistical evidence supports Mr. Clinton's concern; America is increasingly becoming a fatherless society.² Estimates suggest that 40% of all children in the United States resided in fatherless homes in 1995, and "it is predicted that more than one-half of all children in America will spend a 'significant' part of their childhood living apart from their fathers."³

America is also increasingly becoming a nation where children in two-parent families see less and less of their parents because both parents must work outside the home to maintain a reasonable standard of living. It is estimated that in 1998 only 68% of American children lived with two parents⁴ and, of those parents, about 31% were both working full-time outside the home.⁵ This is up from 17% working outside the home in 1980.⁶

Data gathered in 1997 regarding children living with single mothers, often struggling to make ends meet, shows that these

1. President Bill Clinton, Speech at the University of Texas, Austin (Oct. 16, 1995), available at http://clinton1.nara.gov/White_House/EOP/OP/html/ut.html (last visited Sept. 16, 2001).

2. Lynn D. Wardle, *Relationships Between Family and Government*, 31 CAL. W. INT'L L.J. 1, 13 (2000).

3. *Id.*

4. Pamela K. Graham, Note, *Parental Responsibility Laws: Let the Punishment Fit the Crime*, 33 LOY. L.A. L. REV. 1719, 1723 (2000) (citing FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING 7, 14 (1999)).

5. *Id.*

6. *Id.* at 1723-24.

mothers are working outside the home about 41% of the time.⁷

The emancipation of women and their movement toward full equality has also impacted children as married women are increasingly drawn into the outside-the-home workforce. Estimates are that participation of married women in the labor force doubled from 1969 to 1998.⁸ For married women with children less than three years of age, the increase in the workforce over this period “was almost threefold.”⁹ With both parents working outside the home, children often have more daily contact with strangers than their parents.

Divorced mothers with children and those with children born out-of-wedlock share a grim statistical reality: they will find it extremely difficult to avoid poverty. The one-parent family is six times more likely to be poor than the two-parent family.¹⁰ In 1994, it is estimated that 35% of children under the age of six living with only their mother were at less than 50% of the poverty threshold; however, only 4% of those living with both parents were that poor.¹¹ In that same year, 60% of children under the age of six living with only their mothers were at or below the poverty line, whereas only 13% of those living with both parents fell into this category.¹²

There is significant value to children if there are two parents raising them. It is claimed, for example, that the “number of parents living with a child is usually correlative to the amount and quality of human and economic resources available to that child.”¹³ It is also claimed that the family conditions with respect to divorce and family cohesiveness are listed by the Federal Bureau of Investigation as factors “known to affect the volume and type of [juvenile] crime occurring from place to place.”¹⁴

The law surrounding the issue of post-divorce relocation and its impact on children is only one of many family problems society is facing. However, because relocation may place a natural distance

7. *Id.* at 1724.

8. Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving and the Limits of Economic and Liberal Legal Theory*, 34 ST. MICH. J.L. REFORM 371, 374 n.11 (2000).

9. *Id.* at n.12.

10. Wardle, *supra* note 2, at 11 (citing Kenneth F. Boehm, *The Legal Services Program: Unaccountable, Political, Anti-Poor, Beyond Reform and Unnecessary*, 17 ST. LOUIS U. PUB. L. REV. 321, 354-55 (1998)).

11. *Id.* at 11 n.61.

12. *Id.*

13. Graham, *supra* note 4, at 1724.

14. *Id.* (alteration in original).

barrier between the child and the non-custodial parent, it is an issue to be seriously weighed and resolved. Is Minnesota's liberal relocation doctrine "really" serving a child's best interests? Or, is the present state of the law in need of serious repair? While there is wide-spread disagreement over the answers to those questions, all agree that relocation is among the most difficult of the family problems to resolve.¹⁵

II. GENDER POLITICS AND A CHANGING SOCIETY

Gender politics have played a role in custody legislation for decades. For example, the nineteenth century paternal preference, which awarded a minor child to the father absent a showing he was unfit, was biased against women.¹⁶ This preference was followed in most jurisdictions in the twentieth century by the maternal, or tender years, preference, which awarded custody of a child of tender years to its mother, absent a showing she was unfit. This presumption was biased against men. At one time, the Minnesota Legislature suggested that courts match the gender of the minor child involved in a custody dispute to that of the divorcing parent.¹⁷ Such statutes were biased against both men and women.¹⁸

In recent years, gender-driven political organizations have been vocal in their claims of gender bias. One fathers' rights group, for example, claims that:

It is a well documented fact that fathers have a very difficult time obtaining custody due to the pervasive gender-bias that still exists in many parts of the Family Court system. The sad fact is that custody is frequently granted without any regard to who is actually the better

15. See Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction, and Refining Support Issues*, 34 FAM. L.Q. 607, 628-30 (2001) (discussing the difficulties courts face in relocation cases).

16. See *Flint v. Flint*, 63 Minn. 187, 189-90, 65 N.W 272, 273 (1895).

17. In Minnesota, it was thought that older boys were better raised by their fathers; girls, especially infants, were believed better raised by their mothers. From 1969 to 1974, Minnesota courts were not prevented from considering a child's age and sex, and those of the prospective parent, when making custody decisions. In 1974, the Minnesota Legislature removed the language from the statute. Act of March 28, 1974, ch. 330, § 2, 1974 Minn. Laws 555, 555-56 (1974) (codified as amended at MINN. STAT. § 518.17 (2000)).

18. See generally Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 615-29 (1992) (discussing history and effect of gender bias on child custody determinations).

parent and what is truly best for the children.¹⁹

The American Coalition for Fathers and Children declares that it exists to create “a family law system, legislative system, and public awareness which promotes equal rights for ALL parties affected by divorce, and the breakup of a family or establishment of paternity.”²⁰

Women’s political groups are just as vocal in expressing their concerns—especially their rights, the fathers’ rights movement, and biased legislation.²¹ For example, the president of the Michigan National Organization of Women expressed serious concern over the national agenda of fathers’ rights groups:

Forced joint custody is . . . a top legislative priority of fringe fathers’ rights groups nationwide. These groups argue that courts are biased and sole custody awards to mothers deny fathers their right to parent. They alleged

19. Separated Parenting Access and Resource Center, at <http://www.deltabravo.net/custody/index.shtml> (last visited July 31, 2001). The Mission Statement of the Fathers’ Rights and Equality Exchange, states in part:

While there are many highly visible interest groups advocating for the very real plight of single mothers, few groups speak out for the problems encountered by single fathers. As a result, society has come to not only overlook the problems of single fathers, but to view single fathers as the root of all evils visited upon the single mother.

The Fathers’ Rights and Equality Exchange, *Mission Statement*, at <http://dadsrights.org/> (last visited Aug. 19, 2001).

20. American Coalition for Fathers & Children, *ACFC Mission*, at <http://www.acfc.org/missn.htm> (last visited Aug. 19, 2001). A Minnesota organization, The Men’s Defense Association, declares in its mission statement that it intends to “assist individuals discriminated against in divorce and other gender matters through education and referrals to local resources, especially attorneys.” Men’s Defense Organization, *Mission*, at <http://www.mensdefense.org/> (last modified Apr. 11, 2001). Rev. Pat Robertson declared to a 1996 Christian Coalition rally:

And I watched little by little an unremitting assault by the left wing forces, the ACLU, and the National Organization of Women, and other radical groups who began . . . then to assault the institution of marriage . . . [S]tarting about 1970 . . . in almost every state this left wing radical extremist coalition battered down the walls of intact families and passed what were called no fault divorce laws.

James Herbie Difonzo, *Customized Marriage*, 75 IND. L.J. 875, 885 n.40 (Summer 2000).

21. See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 15 (1995) (describing how state policies are implemented to halt any trends that diverge from the traditional nuclear family); Alison Harvison Young, *Reconceiving The Family: Challenging The Paradigm Of The Exclusive Family*, 6 AM. U. J. GENDER & L. 505 (1998) (discussing judicial and legislative biases against “non-traditional family units”).

that, in most cases, mothers are awarded sole custody, with fathers granted visitation rights. The men cite this as proof of bias against fathers.²²

The National Organization of Women issued a nationwide alert in 1996 warning of the increased power of fathers' rights groups.²³

As already touched upon earlier in this article, the nation and Minnesota are undergoing enormous social changes, which are having their greatest impact on the family structure. Recent figures released by the Census Bureau show that of the nation's 105 million households, only 24% consist of married couples with their own children.²⁴ With 25% of American homes occupied by singles living alone,²⁵ there are more single people than traditional families. Furthermore, the number of single-parent households

22. Gloria Woods, "Father's Rights" Groups: Beware Their Real Agenda, NAT'L NOW TIMES, March 1997, available at <http://www.now.org/nnt/03-97/father.html> (last visited Sept. 16, 2001).

23. National Organization of Women, *NOW Action Alert on "Fathers' Rights"*, at <http://www.now.org/organiza/conferen/1996/resoluti.html> (last visited August 24, 2001). The Alert states:

WHEREAS the objectives of [fathers' rights] groups are to increase restrictions and limits on custodial parents' rights and to decrease child support obligations of non custodial parents by using the abuse of power in order to control in the same fashion as do batterers; and

WHEREAS these groups are fulfilling their objectives by forming political alliances with conservative Republican legislators and others and by working for the adoption of legislation such as presumption of joint custody, penalties for "false reporting" of domestic and child abuse and mediation instead of court hearings; and . . .

WHEREAS many judges and attorneys are still biased against women and fathers are awarded custody 70% of the time when they seek it per the Association of Child Enforcement Support (ACES);

THEREFORE BE IT RESOLVED that the National Organization for Women (NOW) begin a national alert to inform members about these "fathers' rights" groups and their objectives through articles in the National Now Times (NNT); and . . .

BE IT FURTHER RESOLVED, that NOW encourage state and local Chapters to conduct and coordinate divorce/custody court watch projects to facilitate removal of biased judges

Id.

24. Jason Fields & Lynne M. Casper, *America's Families and Living Arrangements: Population Characteristics*, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, June 2001, at 3, available at <http://www.census.gov/prod/2001pubs/p20-537.pdf> (last visited Sept. 16, 2001) [hereinafter CENSUS BUREAU REPORT].

25. *Id.*

has grown by 18% over the last thirty years.²⁶ Of this 18%, 14% reflects the number of single-mother households.²⁷ In two million homes, up 4% in thirty years, fathers raise their children without a mother.²⁸ This number represents one household in fifty-two.²⁹

The census data for Minnesota is consistent with that of the rest of the nation. The traditional family—a married couple with their own children—accounts for a little more than a quarter of Minnesota's households.³⁰ While the raw number of married families grew slightly in the 1990s, the growth was much faster for other kinds of families. For example, the number of married couples without children younger than eighteen grew by more than 10%³¹ and accounted for 28.5% of all Minnesota households.³² For the first time, there are more householders living alone in Minnesota—509,468³³—than there are married couples with children under eighteen.

Single parents with children younger than eighteen account for over 11% of all American households,³⁴ up from 6.8% in 1990.³⁵ Ten years ago, single mothers outnumbered single fathers by more than four-to-one, however, they now outnumber single fathers by a ratio of three-to-one.³⁶

The impact of gender-interested political groups will continue to play a role in legislation. However, with the changing structure of the family and as traditional parenting roles become blurred, it may be that the gender of the particular parent will not be considered as relevant as finding new ways for children to maintain

26. *Id.* at 7.

27. *Id.*

28. *Id.*

29. *Id.* at 3.

30. Profile of General Demographic Characteristics for Minnesota: 2000, available at http://www.census.gov/Press-Release/www/2001/tables/dp_mn_2000.PDF [hereinafter Profile 2000].

31. In 2000, there were 540,630 married families without minor children in Minnesota. *Id.* In 1990, there were only 482,527 such families. Profile of General Demographic Characteristics for Minnesota: 1990, available at http://www.census.gov/Press-Release/www/2001/tables/dp_mn_1990.PDF [hereinafter Profile 1990].

32. Profile 2000, *supra* note 30.

33. *Id.*

34. Out of a total of 105 million households in the U.S., ten million were single-mother families and two million were single-father families. CENSUS BUREAU REPORT, *supra* note 24, at 3, 7.

35. *Id.*

36. Compare *id.* with Profile 1990, *supra* note 31.

meaningful, close, regular relationships with both parents following divorce.

III. MINNESOTA'S RELOCATION STANDARD

Minnesota has a fascinating relocation history which is closely linked to several external factors. These factors include society's increased mobility, the emergence of no-fault divorce, greater acceptance of divorce, increased employment opportunities for women of all ages, and men and women remarrying in significant numbers following divorce. Minnesota's relocation story began when the Minnesota Supreme Court decided *Eberhart v. Eberhart*.³⁷

The Eberharts were married in August 1915, a son was born to them in 1916, and in 1918 Cora attempted to divorce Walter, alleging cruel and inhuman treatment.³⁸ The trial did not go well, and Cora was denied a divorce. On the issue of the custody of their youngster, the trial judge ruled that during the couple's separation, Cora should have custody from November 1 until May 1 each year, and that Walter should have custody from May 1 to November 1.³⁹ The Minnesota Supreme Court affirmed the trial judge's ruling.⁴⁰

At some point during the litigation, Cora fled Minnesota with the minor child.⁴¹ The relocation issue arose during the second round of litigation between Cora and Walter when Walter refused to support either Cora or the minor child while they were outside Minnesota.⁴² Walter's motion to relieve him of his support obligation was granted by the trial judge, and Cora appealed.⁴³ In reviewing the matter, the Minnesota Supreme Court affirmed the trial judge stating that unless Cora returned to Minnesota with the child so Walter could exercise visitation, he no longer had a support obligation.⁴⁴

At the time *Eberhart* was decided, most state courts were concerned about losing personal jurisdiction over a party who left

37. 149 Minn. 192, 183 N.W. 140 (1921).

38. *Id.* at 193, 183 N.W. at 140.

39. *Id.*

40. *Id.* at 194, 183 N.W. at 141.

41. *Eberhart v. Eberhart*, 153 Minn. 66, 68, 189 N.W. 592, 592 (1922).

42. *Id.* at 68, 189 N.W. at 593.

43. *Id.*

44. *Id.* at 68, 189 N.W. at 592 ("The plaintiff has taken the child from the jurisdiction of the court. So long as she keeps him without the jurisdiction, the defendant should be relieved from the payment of support money to accrue in the future and that already accrued should not be enforced against him.").

the jurisdiction. Legal scholars were just inventing long-arm statutes and debate over their application was wide-spread. Society was becoming more mobile and Henry Ford's Model "T" Ford began making an impact,⁴⁵ but highways, decent roads, and good bridges were yet to be constructed, and modern air travel was nonexistent. Divorces, of course, were rare. Few women held jobs outside the home and only a handful occupied positions within a profession such as law.

Eberhart was followed in 1940 by *Anderson v. Anderson*,⁴⁶ where a wife violated an express provision of the divorce decree prohibiting her from taking the parties' child outside Minnesota.⁴⁷ The *Eberhart* rule as to future installments of support money, however, was distinguished and modified by the court in 1954 by *Iverson v. Iverson*,⁴⁸ where the wife had defeated the husband's right of visitation by removing the children to California.⁴⁹ In *Iverson*, the trial court granted the wife's motion for a modification of the original divorce decree expressly to permit her to live with the children in California and to require the husband to pay for their support in the future.⁵⁰

Eberhart was reconsidered by the Minnesota Supreme Court in 1956 in *State of Illinois ex rel. Shannon v. Sterling*.⁵¹ The outcome in *Shannon* reflects, at least in part, the extent to which society had changed in the three decades following *Eberhart*.

The parties in *Shannon*, Barbara Shannon and Kenneth Sterling, divorced, and the trial court granted sole physical custody of the minor children to Barbara while providing Kenneth with reasonable visitation.⁵² Following the divorce, Barbara left Minnesota for Illinois without permission of the court or Kenneth.⁵³ Relying on *Eberhart*, Kenneth refused to provide any support.⁵⁴

45. Toyota Japan, *Toyota Automobile Museum*, at <http://www.toyota.co.jp/Museum/Tam/Car/Ford2/> (last visited Aug. 19, 2001). Henry Ford was able to mass produce the Model T and sell it for about \$850. *Id.* He began assembly line production of the model T in 1913. *Id.* Production of the Model T ended on May 27, 1927. *Id.*

46. 207 Minn. 338, 291 N.W. 508 (1940).

47. *Id.*

48. 243 Minn. 54, 66 N.W.2d 549 (1954).

49. *Id.*

50. *Id.* at 57, 66 N.W.2d at 551.

51. 248 Minn. 266, 80 N.W.2d 13 (1956).

52. *Id.* at 269, 80 N.W.2d at 16.

53. *Id.*

54. *Id.*

Barbara, while remaining in Illinois, initiated an action in Minnesota challenging Kenneth's decision.⁵⁵ The trial judge, relying on *Eberhart*, dismissed Barbara's support request on the ground that she had deprived Kenneth of his visitation rights by relocating without his consent or court approval.⁵⁶

On appeal, the Minnesota Supreme Court modified the relocation views it had expressed in *Eberhart*. Consistent with *Eberhart*, it held that a wife, who deprives her husband of his right of visitation by relocating without court approval or without the husband's consent, cannot compel the husband to pay her any of the support obligation that accrued during the period he was denied visitation.⁵⁷ However, it also held that a trial judge possessed the power to modify the divorce decree to permit the children to remain outside Minnesota and compel support from the father without mandating the return of the custodial parent to Minnesota.⁵⁸

The *Shannon* court was influenced by the recently adopted Uniform Reciprocal Enforcement of Support Act (URESA), which allowed interstate resolution of support issues. The court held that despite the express terms of an original divorce decree, URESA could be utilized to modify a husband's visitation and authorize a custodial wife to reside with the children outside the state and compel the husband to pay for the future support of the children.⁵⁹ The ruling erased the harsh view taken in *Eberhart*.

The most significant change in Minnesota's relocation law occurred almost two decades ago when the Minnesota Supreme Court decided *Auge v. Auge*.⁶⁰ Since this decision, the court has not directly revisited the issue.

The parties, Carol Ann (Auge) Berc and Frank Daniel Auge, were married in 1974, separated in 1975, and divorced in 1979.⁶¹ In 1975 a child, Frank Daniel Auge, Jr., was born to them. Frank Junior suffered from physical disabilities.⁶²

When they divorced, Carol Ann received sole, physical custody

55. *Id.*

56. *Id.*

57. *Id.* at 273, 80 N.W.2d at 18.

58. *Id.* at 274, 80 N.W.2d at 19.

59. *See* MINN. STAT. §§ 518.41-518.52 (1956).

60. 334 N.W.2d 393 (Minn. 1983).

61. Appellant's Br. at 6, *Auge v. Auge*, 334 N.W.2d 393 (Minn. 1983) (No. CX-82-1323).

62. *Id.*

of Frank Junior, and Frank Senior was awarded visitation that encompassed alternate weekends, one week during the child's Christmas vacation period, and four weeks during the summer.⁶³

In 1979 Carol Ann began living with Max Berc, Sr.,⁶⁴ who is described in various court documents as "over sixty years old," possessing a net worth "in excess of three million dollars," and owning extensive business holdings in Hawaii with an annual income in excess of \$185,000.⁶⁵ Two children were born to Max and Carol Ann, and she was pregnant with a third when they were married in Hawaii in January 1983.⁶⁶

In 1981, Carol Ann asked the Ramsey County, Minnesota district court to allow her to relocate with Frank Junior to Hawaii from December 5, 1981 to June 5, 1982.⁶⁷ She stated that the move was necessitated by the business activities of her live-in partner.⁶⁸

Frank Senior responded by moving for a court order giving him sole physical custody of the child.⁶⁹ Following an evidentiary hearing, the trial judge granted Carol Ann permission to relocate with Frank Junior to Hawaii for the requested six-month period.⁷⁰ The judge conditioned the order on Carol Ann providing Frank Senior with funds for round-trip transportation for himself between St. Paul and Honolulu and either suitable accommodations for himself and the child for up to ten days or a sum equal to \$45 per day for up to ten days.⁷¹ Carol Ann was also ordered to provide funds sufficient for a second round-trip air ticket.⁷² She and the minor child left Minnesota in December for Hawaii.

In the summer of 1982, Carol Ann brought another removal request to the Ramsey County, Minnesota district court.⁷³ This time she asked the court for permission to relocate with Frank Junior to Hawaii from November through May. Frank Senior countered that he was not able to afford to take the trips to Hawaii, which had been contemplated by the 1981 order, and asserted that the new

63. *Id.* at 7.

64. *Id.* at 8.

65. App. to Appellant's Br. at 51, *Auge* (No. CX-82-1323); Resp't. Br. at 5, *Auge* (No. CX-82-1323).

66. Resp't. Br. at 5, *Auge* (No. CX-82-1323).

67. *Id.* at 6.

68. *Id.* at 9.

69. Appellant's Br. at 10, *Auge* (No. CX-82-1323).

70. *Id.* at 11.

71. *Id.* at 11-12.

72. App. to Appellant's Br. at 13, *Auge* (No. CX-82-1323).

73. Appellant's Br. at 14, *Auge* (No. CX-82-1323).

request was an attempt to interfere with his visitation rights.⁷⁴ He again asked that he receive sole physical custody of Frank Junior.⁷⁵

Without conducting a hearing, the Referee appointed to hear the dispute ruled that Carol Ann's request was "contrary to the best interests of the child."⁷⁶ The referee also found "no deep business necessity" for Max Berc to take Frank Junior and his mother to Hawaii. The district court affirmed the Referee's ruling and Carol Ann sought an expedited hearing with the Minnesota Supreme Court via a Writ of Mandamus.⁷⁷ The petition was denied,⁷⁸ however, and the normal appeal process took over.⁷⁹

With the mandamus petition dismissed, and a decision on the appeal months away, the trial judge granted Frank Senior's request that he be awarded temporary physical custody of Frank Junior.⁸⁰ Carol Ann, Max and the minor children, except Frank Junior, left Minnesota for Hawaii in November 1982.⁸¹

In the summer of 1983, the Minnesota Supreme Court issued its ruling and established a new set of legal principles to apply in relocation disputes. These principles remain intact to the present.

The court was obviously upset over the trial judge's decision changing sole, physical custody from Carol Ann to Frank Senior without first conducting an evidentiary hearing. It held that because denying a custodial parent's permission to relocate to another state effectuates a change in custody, a trial judge cannot issue such an order without first conducting a full evidentiary hearing where witnesses may be cross-examined.⁸²

The court then weighed in heavily on the side of supporting a custodial parent's relocation effort. It held that Minnesota Statutes section 518.18(d), which on its face is silent on the matter, contained an implicit presumption that relocation must be permitted, subject only to the non-custodial parent's ability to

74. *Id.*

75. Resp't Br. at 10, *Auge* (No. CX-82-1323).

76. Appellant's Br. at 15, *Auge* (No. CX-82-1323); Resp't Br. at 10, *Auge* (No. CX-82-1323).

77. *Id.*

78. Appellant's Br. at 15, *Auge* (No. CX-82-1323). The writ was denied October 27, 1982. *Id.*

79. *Id.*

80. *Id.* at 15-16.

81. *Id.* at 16.

82. *Auge*, 334 N.W.2d at 396; *see also* *Morey v. Peppin*, 375 N.W.2d 19 (Minn. 1985).

establish that relocation is not in the child's best interests.⁸³ The implicit presumption theory sprang from discussions the court found in a student law review note,⁸⁴ articles by Goldstein, Frensdorff, Solnit and Mnookin,⁸⁵ and decisions from South Dakota,⁸⁶ New Jersey,⁸⁷ and a handful of other jurisdictions.⁸⁸ The court observed that New Jersey's relocation statute, which at the time was similar to Minnesota's, "allows removal only upon 'cause shown.'"⁸⁹ This phrase was viewed, however, as not including the whole range of issues going to primary custody, but rather the probability of assuring reasonable visitation to the non-custodial parent.⁹⁰

Auge directed trial judges to presume that a relocation request was in the best interests of the child,⁹¹ and if opposed by the non-custodian for reasons of health, education or religion, they were to defer to the custodial parent's decisions unless, after an evidentiary hearing, it was determined that "failure to limit the custodial parent's authority will endanger the child's health or development."⁹²

83. *Auge*, 334 N.W.2d at 396. Minnesota Statutes § 518.18(d) stated that in modification proceedings,

the court shall retain the custodian established by the prior order unless: . . . (iii) The child's present environment endangers his physical or emotional health or impairs his emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

MINN. STAT. § 518.18(d) (1982).

84. Note, *Residence Restrictions on Custodial Parents: Implications for the Right to Travel*, 12 RUTGERS L.J. 341, 361 n.124 (1981).

85. JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 8-11 (1979); Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., 226, 265 (1975).

86. *In re Ehlen*, 303 N.W.2d 808, 810 (S.D. 1981).

87. *D'Onofrio v. D'Onofrio*, 365 A.2d 27 (N.J. Super. Ct. Ch. Div. 1976).

88. The court cited the following as examples: *In re Marriage of Siklossy*, 409 N.E.2d 29, 32 (Ill. App. Ct. 1980); *In re Marriage of Lower*, 269 N.W.2d 822, 826 (Iowa 1978); *Hale v. Hale*, 429 N.E.2d 340, 343 (Mass. App. Ct. 1981). It also observed that other courts took a more middle-of-the-road approach, establishing no presumption but allowing removal if it is in the best interests of the child and giving as examples: *Hutchins v. Hutchins*, 269 N.W.2d 539, 540 (Mich. Ct. App. 1978); *Jafari v. Jafari*, 284 N.W.2d 554, 555 (Neb. 1979).

89. *Auge v. Auge*, 334 N.W.2d 393, 398 (Minn. 1983) (citing N.J. STAT. ANN. § 9:2-2 (West 1976)).

90. *Id.* at 396.

91. *Id.* at 399; see also *Gordon v. Gordon*, 339 N.W.2d 269, 271 (Minn. 1983).

92. *Auge*, 334 N.W.2d at 399-400 (citing MINN. STAT. § 518.176, subd. 1 (1982)). See, e.g., *Knott v. Knott*, 418 N.W.2d 505, 508 (Minn. Ct. App. 1988) (allowing removal to California of two children not clearly erroneous where

The court incorporated its relocation principles into application of Minn. Stat. § 518.18(d), with the consequence that a non-custodial parent could not prevent relocation, absent a *prima facie* showing that relocation would *harm* the child's physical or emotional health. Incorporating the statute provided additional support for custodial parents considering relocation.⁹³

The court also accepted the "different family unit theory," first espoused by the New Jersey Supreme Court in *D'Onofrio v. D'Onofrio*.⁹⁴

The children, after the parents' divorce or separation, belong to a different family unit than they did when the parents lived together. The new family unit consists only of the children and the custodial parent, and what is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interests of the children. It is in the context of what is best for that family unit that the precise nature and terms of visitation and changes in visitation by the non-custodial parent must be considered.⁹⁵

The court in *Auge* rationalized its new relocation principles on three bases: First, they obviated *de novo* consideration of which parent is the better custodian, where the issue had earlier been

noncustodian failed to establish a *prima facie* case that move was not in the best interest of the two children sought to be removed); *Lucas v. Lucas*, 389 N.W.2d 744, 747 (Minn. Ct. App. 1986) (stating non-custodial parent must establish by preponderance of evidence that move is not in best interest of child); *Corwin v. Corwin*, 366 N.W.2d 321, 325 (Minn. Ct. App. 1985) (holding custodial parent may remove child from state absent proof that the move would endanger child's best interest); *Benson v. Benson*, 346 N.W.2d 196, 198 (Minn. Ct. App. 1984) (allowing motion by custodial parent to be granted unless the party opposing the motion establishes by a preponderance of the evidence that the move is not in the best interest of the child); *Meyer v. Meyer*, 346 N.W.2d 369, 371 (Minn. Ct. App. 1984) (requiring that permission be given to the custodial parent to remove a child from the state unless the non-custodial parent establishes by a preponderance of the evidence that the move is not in the best interests of the child or is sought for the purpose of interfering with the non-custodial parent's visitation rights).

93. MINN. STAT. § 518.176, subd. 1; *see also* *Lucas v. Lucas*, 389 N.W.2d 744, 747 (Minn. Ct. App. 1986) (concluding that because respondent did not rebut answers to questions raised at the hearing, the trial court maintained the burden of finding reliable evidence of the best interests of the children before it finally approved the move).

94. 365 A.2d 27 (N.J. Super. Ct. Ch. Div. 1976).

95. *Id.* at 29-30.

resolved.⁹⁶ Second, they maintained the child in the family unit to which, in the eyes of the court, the child “currently belongs,” and minimizes judicial interference with decisions affecting that family unit.⁹⁷ Finally, they placed the decision regarding a minor child “with the person best able to consider the child’s needs.”⁹⁸

The court also observed that, in the past, relocation requests were sometimes denied because of the potential loss of jurisdiction over custody issues.⁹⁹ However, with the adoption of the Uniform Child Custody Act¹⁰⁰ and the Parental Kidnapping Prevention Act of 1980,¹⁰¹ it felt that these historic concerns were no longer significant. The *Auge* doctrine has been followed in numerous decisions and remains the law in Minnesota today.¹⁰²

IV. COMPARING MINNESOTA’S RELOCATION STANDARD WITH OTHER JURISDICTIONS

When Minnesota’s post-divorce relocation standard is

96. *Auge*, 334 N.W.2d at 399.

97. *Id.*

98. *Id.*; see *Meyer v. Meyer*, 346 N.W.2d 369, 371 (Minn. Ct. App. 1984) (stating children’s interests are to be considered in the context of what is best for the family unit made up of the children and the custodial parent).

99. *Auge*, 334 N.W.2d at 399.

100. MINN. STAT. §§ 518A.01-.25 (1982).

101. 28 U.S.C. § 1738A (Supp. V 1981).

102. See, e.g., *Frauenshuh v. Giese*, 599 N.W.2d 153, 159 (Minn. 1999); *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996); *Ayers v. Ayers*, 508 N.W.2d 515, 519 (Minn. 1993); *Sefkow v. Sefkow*, 427 N.W.2d 203, 213 (Minn. 1988); *In re Welfare of J.J.B.*, 390 N.W.2d 274, 279 (Minn. 1986); *In re Welfare of J.W.*, 391 N.W.2d 791, 795 (Minn. 1986); *Morey v. Peppin*, 375 N.W.2d 19, 25 (Minn. 1985); *Gordon v. Gordon*, 339 N.W.2d 269, 270 (Minn. 1983); *State ex rel Gunderson v. Preuss*, 336 N.W.2d 546, 548 (Minn. 1983); *In re A.R.M.*, 611 N.W.2d 43, 49 (Minn. Ct. App. 2000); *Ballard v. Wold*, 486 N.W.2d 161, 163 (Minn. Ct. App. 1992); *Spaeth v. Warren*, 478 N.W.2d 319, 324 (Crippen, J., dissenting) (Minn. Ct. App. 1991); *Geiger v. Geiger*, 470 N.W.2d 704, 705 (Minn. Ct. App. 1991); *Danielson v. Danielson*, 393 N.W.2d 405, 407 (Minn. Ct. App. 1986); *Greenlaw v. Greenlaw*, 396 N.W.2d 68, 72 (Minn. Ct. App. 1986); *Haasken v. Haasken*, 396 N.W.2d 253, 258 (Minn. Ct. App. 1986); *In re Welfare of B.E.N.*, 392 N.W.2d 736, 738 (Minn. Ct. App. 1986); *Lucas v. Lucas*, 389 N.W.2d 744, 746 (Minn. Ct. App. 1986); *Pekarek v. Pekarek*, 384 N.W.2d 493, 498 (Minn. Ct. App. 1986); *Sydnes v. Sydnes*, 388 N.W.2d 3, 5 (Minn. Ct. App. 1986); *Vogt v. Vogt*, 385 N.W.2d 69, 71 (Minn. Ct. App. 1986); *Johnson v. Smith*, 374 N.W.2d 317, 321 (Minn. Ct. App. 1985); *Kellen v. Kellen*, 367 N.W.2d 648, 650 (Minn. Ct. App. 1985); *Otava v. Otava*, 374 N.W.2d 509, 511 (Minn. Ct. App. 1985); *Adam v. Adam*, 358 N.W.2d 487, 488 (Minn. Ct. App. 1984); *Benson v. Benson*, 346 N.W.2d 196, 198 (Minn. Ct. App. 1984); *Meyer v. Meyer*, 346 N.W.2d 369, 371 (Minn. Ct. App. 1984); *Tieso v. Hansen*, 349 N.W.2d 863, 864 (Minn. Ct. App. 1984).

compared to that found in other jurisdictions, it is apparent that Minnesota has created a standard that is among the most liberal in the nation.¹⁰³ As noted earlier, this liberal standard was created by the Minnesota Supreme Court out of a custody modification provision that some had viewed as favoring the non-custodial parent.¹⁰⁴ Minnesota is not alone in its liberal, pro-relocation view, however, and has been joined by Wisconsin, South Dakota, California and several other jurisdictions. Moreover, a recent survey of relocation decisions in America indicates that the “vast majority” of courts are permitting post-divorce custodial parent relocation.¹⁰⁵

Minnesota and the jurisdictions favoring liberal relocation combine a few well-established facts with a handful of assumptions

103. Minnesota will grant an evidentiary hearing in a relocation dispute only if the affidavits submitted by the non-custodial parent, taken as true, establish a *prima facie* case. *Nice-Peterson v. Nice-Peterson*, 310 N.W.2d 471, 472 (Minn. 1981). To establish a *prima facie* case, the moving party must demonstrate a change of circumstance in the child’s environment that endangers the child’s physical or emotional health or emotional development, that a modification would be in the child’s best interests, and that the advantage of a change will outweigh any harm likely caused by the change. MINN. STAT. § 518.18(d) (1998); see *Abbott v. Abbott*, 481 N.W.2d 864, 868 (Minn. Ct. App. 1992).

104. See *Auge*, 334 N.W.2d 393. The court noted that “[t]his statute most frequently comes into play upon a non-custodial parent’s motion that custody be transferred to him or her, rather than in the context of a motion for removal from the state.” *Id.* at 396-97. The court found the underlying considerations of both issues similar and viewed denying the custodial parent permission to relocate as a conflict often resulting in a modification of custody. *Id.* at 395-96. In *Auge*, while not excluding other grounds to deny relocation, the court noted only one means by which a non-custodial parent could meet this burden: the non-custodial parent could show that the purpose of the move is to frustrate the non-custodial parent’s visitation rights. *Id.* This view has resulted in a very relaxed standard.

105. *Elrod & Spector*, *supra* note 15, at 629 (citing *Thomas v. Thomas*, 705 N.Y.S.2d 435 (N.Y. 2000) (considering relocation in awarding the mother primary physical custody); see also *In Ex parte Monroe*, 727 So.2d 104, 106 (Ala. 1999) (finding evidence sufficient to support the trial court’s modification of a custody order to place the child with the father if the mother moved to Michigan); *Pearson v. Pearson*, 5 P.3d 239, 243-44 (Alaska 2000) (allowing mother to move to Pennsylvania and modifying father’s visitation); *Walkowiak v. Walkowiak*, 749 So.2d 855, 859 (La. Ct. App. 1999) (finding no error for court to make mother primary domiciliary parent and allow her to relocate to her home state); *Farnsworth v. Farnsworth*, 597 N.W.2d 592, 599-600 (Neb. 1999) (concluding career opportunities sufficient to allow the mother to move); *Chen v. Heller*, 759 A.2d 873 (N.J. Super. Ct. App. Div. 2000); *In re Henion*, 699 N.Y.S.2d 815, 816 (N.Y. App. Div. 1999) (holding preponderance of evidence showed relocation in best interest of children); *In re Marriage of Pape*, 989 P.2d 1120 (Wash. 1999), *as corrected*, (Feb. 15, 2000). *Contra Stark v. Anderson*, 748 So.2d 838, 838 (Miss. Ct. App. 1999) (ruling evidence sufficient to change custody to father).

about the future improvement in the life of the custodial parent to support their position. The facts relied upon include recognition that society is increasingly mobile, that there is a high incidence of divorce and remarriage, and both parents often move following divorce.¹⁰⁶ The assumption the jurisdictions make is that relocation will result in a better life and greater happiness for the custodian, and that this will positively affect the minor child.¹⁰⁷

These jurisdictions also see liberal relocation as an important equalizing factor in post-divorce life.¹⁰⁸ They reason that because there are no legal relocation constraints on a non-custodial parent, it would be unfair to impose relocation restrictions on the custodial parent, even if the new location is geographically distant from the child's residence.¹⁰⁹ They believe that the custodial parent should be entitled to the same opportunity for a better life as that provided the non-custodial parent. For these jurisdictions, a liberal relocation standard helps accomplish this goal.¹¹⁰

The liberal relocation jurisdictions adopt the principle that a custodial parent's relocation request is presumptively in the child's best interests. The presumption also provides the custodial parent with a significant amount of security by permitting relocation while retaining custody. The presumption is linked to an assumption that it will help promote stability in the custodial parent's relationship with the minor child.

The liberal relocation jurisdictions also support the use of presumptions on pragmatic grounds. They believe that presumptions help prevent future litigation problems by reducing custody relocation disputes, usually simplify the issues in a dispute, and provide the custodial parent with confidence in knowing how a court will most likely decide a relocation issue.¹¹¹ Furthermore,

106. It is claimed by some that this mode of behavior is "coming to represent the norm." 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).

107. See, e.g., *Madgett v. Madgett*, 360 N.W.2d 411, 413 (Minn. Ct. App. 1985) (holding that "[t]here is a presumption that a request by the custodial parent to remove the child to another state is in the best interests of the child . . . to encourage continuity and stability in post-dissolution family relationships.").

108. See, e.g., *D'Onofrio v. D'Onofrio*, 365 A.2d 27, 27 (N.J. Super. Ct. Ch. Div. 1976).

109. *Id.*

110. *Id.*

111. Ann M. Driscoll, *In Search of a Standard: Resolving the Relocation Problem in New York*, 26 HOFSTRA L. REV. 175, 187 (1997).

presumptions are viewed as useful in reducing unchecked judicial discretion.¹¹²

Under Minnesota's liberal standard, the custodial parent is protected by both a favorable presumption and a "harm" barrier that the noncustodian must overcome if the move is to be prevented. Absent a showing that relocation would psychologically or physically harm a child, a custodial parent may relocate to another state. Although the meaning of "harm" is unclear, relocation would probably be denied where a child with a serious medical condition was relocating to an area where the condition cannot be adequately treated.

The more conservative relocation jurisdictions tend to emphasize that the child's interests are separate from those of the parents. They utilize presumptions favoring the non-custodial parent and place the burden of proving that the move is in a child's best interests on the parent seeking to relocate.¹¹³

The conservative jurisdictions assume that the distance between the child and the non-custodial parent may be a significant detrimental factor in continuing the child's healthy development. They link distance and irregular visits created by distance to their belief that everything reasonably possible should be done to preserve and foster both parents' relationships with the child.

A few jurisdictions, such as Maryland, seem to be moving toward a neutral view of relocation.¹¹⁴

The wide variety of national standards suggests that relocation decisions may turn more on the doctrinal view of a particular jurisdiction than the best interests of a minor child.¹¹⁵ The following analysis from a handful of representative jurisdictions

112. See *Costa v. Costa*, 429 So. 2d 1249 (Fla. 1983).

113. See, e.g., *Pollock v. Pollock*, 889 P.2d 633, 636 (Ariz. Ct. App. 1995) (holding that although the custodial parent should show an advantage to the move, it is only one of several factors which the court may consider); *Staab v. Hurst*, 868 S.W.2d 517, 520 (Ark. Ct. App. 1994) (placing burden on custodial parent to show "some real advantage" to relocation); *Ramos v. Ramos*, 697 So. 2d 280, 283 (La. Ct. App. 1997) (ruling burden on custodial parent to prove that "the move is in the child's best interest").

114. See Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245, 293 (1996) (noting that Maryland courts have classified the new relocation statute as neutral, although it appears to favor the non-custodial parent).

115. See Mandy S. Cohen, *A Toss of the Dice . . . The Gamble With Post Divorce-Relocation Laws*, 18 HOFSTRA L. REV. 127, 136-49 (1989).

further illustrates the national conflict over relocation standards.

South Dakota has a liberal relocation standard similar to Minnesota's; it places minimal relocation restrictions on the custodial parent. In *Fortin v. Fortin*,¹¹⁶ the court ruled that a non-custodial parent does not have a right to prior notice of relocation and possesses no opportunity to be heard in opposition to the relocation, unless the noncustodian initiates an action for a restraining order.¹¹⁷ The burden of proof is placed on the non-custodial parent to show how the relocation is inconsistent with the child's best interests.¹¹⁸

Wisconsin has a liberal relocation standard and employs statutory presumptions favoring relocation that generally dictate the outcome of relocation disputes.¹¹⁹ Wisconsin also requires that

116. 500 N.W.2d 229, 232 (S.D. 1993).

117. The South Dakota statute reads as follows: "A parent entitled to the custody of a child has the right to change his residence, subject to the power of the circuit court to restrain a removal which would prejudice the rights or welfare of the child." S.D. CODIFIED LAWS § 25-5-13 (Michie 1984).

118. See Jennifer L. Linngren, Note, *The Feuding Fortins: South Dakota Adopts a Presumption in Favor of the Custodial Parent's Right to Remove a Minor Child from the Jurisdiction in Fortin v. Fortin*, 39 S.D. L. REV. 661, 662 (1994).

119. WIS. STAT. § 767.327(3)(a)2.a (2000) provides:

There is a rebuttable presumption that continuing the current allocation of decision making under a legal custody order or continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child. This presumption may be overcome by a showing that the move or removal is unreasonable and not in the best interest of the child.

Id. Section 767.327 provides, as material here:

Moving the child's residence within or outside the state.

(3) STANDARDS FOR MODIFICATION OR PROHIBITION IF MOVE OR REMOVAL CONTESTED.

(a) 1. Except as provided under par. (b), if the parent proposing the move or removal has sole custody or joint legal custody of the child and the child resides with that parent for the greater period of time, the parent objecting to the move or removal may file a petition, motion or order to show cause for modification of the legal custody or physical placement order affecting the child. The court may modify the legal custody or physical placement order if, after considering the factors under sub. (5), the court finds all of the following:

a. The modification is in the best interest of the child.

b. The move or removal will result in a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

2. With respect to sub.1.:

the non-custodial parent, objecting to a relocation request, petition for a change in custody, and then overcome the presumption that the move is in the best interests of the child. In *Kerkvliet v. Kerkvliet*,¹²⁰ relocation was allowed even though the custodial mother's motive for moving with the children was deemed "feeble and insensitive."¹²¹ Wisconsin courts view the relocation issue as involving not whether to allow the move, but rather whether to transfer custody to the non-custodial parent in the event that the move actually took place.¹²²

North Dakota is a conservative jurisdiction, and its relocation law markedly differs from that of Minnesota, Wisconsin, or South Dakota. In North Dakota, if a non-custodial parent receives visitation rights in a divorce decree,¹²³ a custodial parent "may not change the residence of the child to another state except upon order of the court or with the consent of the non-custodial parent." The purpose of this standard is said to protect the non-custodial parent's visitation rights where the custodial parent wants to move out of the state.¹²⁴ North Dakota places the burden on the custodial parent to prove, by a preponderance of the evidence, that relocation is "in the best interests of the child,"¹²⁵ and emphasizes

a. There is a rebuttable presumption that continuing the current allocation of decision making under a legal custody order or continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child. This presumption may be overcome by a showing that the move or removal is unreasonable and not in the best interest of the child.

b. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under that subdivision.

Id. § 767.327(3).

120. 480 N.W.2d 823 (Wis. Ct. App. 1992).

121. *Id.* at 829.

122. *Id.* at 826.

123. N.D. CENT. CODE § 14-09-07 (1999); see also *Henz v. Henz*, 624 N.W.2d 694, 696 (N.D. 2001).

124. *Olson v. Olson*, 611 N.W.2d 892, 894 (N.D. 2000); *Hanson v. Hanson*, 567 N.W.2d 216, 218 (N.D. 1997).

125. See *Stout v. Stout*, 560 N.W.2d 903, 906 (N.D. 1997); see also *Tishmack v. Tishmack*, 611 N.W.2d 204, 206 (N.D. 2000); *Keller v. Keller*, 584 N.W.2d 509, 512 (N.D. 1998). The court has specified four factors for consideration in determining if a requested change in a child's residence to another state is in the child's best interest: (1) the prospective advantages of the move in improving the custodial parent's and child's quality of life; (2) the integrity of the custodial parent's motive for relocation, considering whether it is to defeat or deter

that visitation is not merely a privilege of the non-custodial parent, but a right of the children. Visitation is presumed to be in the children's best interests.¹²⁶

Connecticut does not align itself with Minnesota's liberal relocation standard or with states such as North Dakota; rather, it attempts to adhere to a middle-of-the-road relocation view. In *Ireland v. Ireland*,¹²⁷ the court held that when a custodial parent seeks permission to relocate, the initial burden is on that parent to demonstrate that the relocation is for a legitimate purpose and the proposed relocation is reasonable in light of that purpose. Once the custodial parent has made a *prima facie* showing, the burden then shifts to the non-custodial parent to prove, by a preponderance of the evidence, that the relocation is not in the best interests of the child. The court reasoned that if it required the custodial parent to forego potential benefits of relocation—such as educational, employment or marriage opportunities—it would result in denying the minor child the correlative benefits of such opportunities such as increased financial or emotional stability of the family unit.¹²⁸

Colorado's relocation view is similar to that of Connecticut. In *In re Marriage of Francis*,¹²⁹ the Colorado Supreme Court held that in removal cases, "the custodial parent must present a *prima facie* case

visitation by the non-custodial parent; (3) the integrity of the non-custodial parent's motives for opposing the move; (4) the potential negative impact on the relationship between the non-custodial parent and the child, including whether there is a realistic opportunity for visitation which can provide an adequate basis for preserving and fostering the non-custodial parent's relationship with the child if relocation is allowed, and the likelihood that each parent will comply with such alternate visitation. "No one factor dominates, and a factor that has minor impact in one case may be the dominant factor in another." *State ex rel. Melling v. Ness*, 592 N.W.2d 565, 569 (N.D. 1999).

126. *Tibor v. Tibor*, 623 N.W.2d 12, 16 (N.D. 2001); *see* *Hendrickson v. Hendrickson*, 603 N.W.2d 896, 902 (N.D. 2000); *Stout*, 560 N.W.2d at 911.

127. 717 A.2d 676 (Conn. 1998).

128. *See, e.g., In re Marriage of Burgham*, 408 N.E.2d 37, 40 (Ill. App. Ct. 1980) (stating "a request [to relocate] would likely indirectly benefit the child by making the custodian a happier, better adjusted parent than would be the case if the custodian's freedom of movement was more restrained."); *Cooper v. Cooper*, 491 A.2d 606, 612 (N.J. 1984) (concluding "[b]ecause the best interests of a child are so interwoven with the well-being of the custodial parent, the determination of the child's best interest requires that the interests of the custodial parent be taken into account"); *Long v. Long*, 381 N.W.2d 350, 355 (Wis. 1986) (saying the trial court should not have "ignored the impact of the custodial [parent]'s well-being on the children").

129. 919 P.2d 776 (Colo. 1996).

showing that there is a sensible reason for the move.”¹³⁰ Once a *prima facie* case has been established, it is presumed that the best interests of the child are to remain with the custodial parent and the burden shifts to the non-custodial parent to demonstrate that the move is not in the best interests of the child.

For many years, New York was considered among the most restrictive relocation jurisdictions in the nation. It followed a procedure that required the non-custodial parent to prove that relocation deprived the non-custodial parent of meaningful “access.” Once that burden was met, the custodial parent then had to show “exceptional circumstances” supporting the move. However, in *Tropea v. Tropea*,¹³¹ it replaced the “exceptional circumstance” test with a detailed inquiry as to what is in the child’s best interest. It held that the outcome of relocation requests should be determined by consideration of all relevant facts, with predominant emphasis placed on what outcome is most likely to serve the “best interests” of the child.¹³² This approach resembles a *de novo* custody determination.¹³³ While *Tropea* failed to establish

130. *Id.* at 784-85.

131. 665 N.E.2d 145 (N.Y. 1996).

132. A trial judge faced with a relocation request in New York is to conduct a detailed inquiry into a number of factors including the following:

- (1) the quality of the alternate home environments; (2) a comparison of the parental guidance which would be provided to the child if relocation were granted and if relocation were denied; (3) the financial status and ability of each parent to provide for the child; (4) the ability of each parent to provide for the child’s emotional and intellectual development; (5) the desires of the child with appropriate weight given to the child’s young age and maturity; (6) the quantitative and qualitative impact upon the child of losing existing contacts with the Father and the community or with the Mother, Step-Father and siblings; (7) the quantitative and qualitative impact upon the non-custodial parent of losing existing contacts with the child; (8) the feasibility of devising a visitation schedule or other arrangement that will enable the non-custodial parent to maintain a meaningful parent-child relationship; (9) the difficulty, advantage and disadvantage that the child will experience in residing and adapting to a remarkably new and different place and culture; (10) the economic necessity or lack thereof for wanting to relocate; (11) the existence of good faith in requesting and opposing the relocation and whether Respondent’s reasons for moving are valid and sound; (12) Respondent’s attempts to obtain a “fresh start”; and (13) the continued or exacerbated hostility between Petitioner and Respondent if relocation were permitted and if relocation were denied.

Lazarevic v. Fogelquist, 668 N.Y.S.2d 320, 322 (N.Y. Sup. Ct. 1997).

133. For a detailed analysis of *Tropea v. Tropea*, see Edwin J. (Ted) Terry et al.,

which party should bear the burden of proof as to the child's best interests, lower courts of that state have indicated that the burden is on the custodial parent.¹³⁴

California adopted a liberal relocation standard in *In re Marriage of Burgess*.¹³⁵ There, the court held that a custodial parent seeking to relocate bears no burden of establishing that the move is necessary.¹³⁶ Rather, the custodial parent has the right to change the residence of the child, except in the case of a move detrimental to the child or a move intended to deprive the non-custodial parent of contact. The custodial parent need not show that relocation is essential or expedient, and the trial court must take into account the presumption that the custodial parent has a right to move with her child, provided that the move would not be prejudicial to the child's rights or welfare.¹³⁷

The South Carolina Supreme Court established a presumption against relocation in *McAlister v. Patterson*.¹³⁸ However, that state's appellate court has apparently not applied the presumption to any relocation case since it was established in 1982.¹³⁹

The message sent by the variety of inconsistent relocation standards throughout the nation is this: whether relocation is allowed may depend on whether a state has created a presumption, and then, to whom the presumption is applied. The standard selected, however, may depend on which of the various political interest groups have been the most successful in lobbying the legislature; or, it may turn on the particular political views of a majority of a state's judiciary.

Relocation: Moving Forward or Moving Backward?, 31 TEX. TECH L. REV. 983, 987 (2000).

134. See, e.g., *Burnham v. Basta*, 659 N.Y.S.2d 945, 947 (N.Y. App. Div. 1997) (placing burden on custodial parent).

135. 913 P.2d 473 (Cal. 1996) (involving mother with sole custody who wanted to make forty-mile move on the basis of employment).

136. *Id.* at 476, 482. Prior to *Burgess*, California courts had required a custodial parent seeking to relocate to show that the move was in the child's best interests. See *In re Marriage of Hoover*, 46 Cal. Rptr. 2d 737, 740 (Cal. Ct. App. Nov. 20, 1995). In *In re Marriage of Carlson*, the California Court of Appeal stated that the "precise test is whether any rational trier of fact could conclude that the trial court order advanced the best interests of the child." *In re Marriage of Carlson*, 280 Cal. Rptr. 840, 845 (Cal. Ct. App. 1991).

137. *Burgess*, 913 P.2d at 478.

138. 299 S.E.2d 322 (S.C. 1982).

139. Caroline Ritchie Heil, *Relocation Cases as Change in Custody Proceedings: "Judicial Blackmail" or Competing Interests Reconciled?*, 51 S.C. L. REV. 885, 886, 898 (2000).

V. THE EXPERTS DISAGREE

The central issue in the national relocation debate focuses on the answer to these questions: Is frequent and continuing contact with both parents in a child's best interests? Or, is a child's need for stability and need to remain with the custodial parent more important than maintaining frequent and continuing contact with the non-custodial parent on a weekly or bi-weekly basis? The answers provided by experts studying the relocation issue, which may have once appeared reasonably clear and without major disagreement, are now hotly debated. Because the experts can't agree, jurisdictions are faced with making hard choices on less than reliable scientific evidence.

Minnesota's struggle with relocation experts is apparent upon examination of decisions such as *Silbaugh v. Silbaugh*.¹⁴⁰ In this dispute, Meredith Silbaugh, who was awarded sole physical custody of the couple's children following divorce, notified her ex-husband John that she wished to relocate to Arizona with their children.¹⁴¹ John opposed the move, and the couple sought resolution through mediation.¹⁴² When mediation failed, Meredith petitioned the court to authorize relocation.¹⁴³ John requested an evidentiary hearing or, in the alternative, modification of the judgment making him the child's primary custodian should Meredith leave Minnesota.¹⁴⁴

In support of his motion to obtain an evidentiary hearing, which required a *prima facie* showing of endangerment, John attached a number of affidavits to his moving papers.¹⁴⁵ They included sworn statements by his brother and sister, whose children regularly played with John and Meredith's children, his pastor, a friend, and an acquaintance of both parties, who related an instance of alcohol use by Meredith's fiancé.¹⁴⁶ In John's affidavit, he claimed that Meredith and her fiancé abused alcohol.¹⁴⁷

John retained Dr. Charles Cutler, a licensed psychologist, to

140. 543 N.W.2d 639 (Minn. 1996).

141. *Id.* at 640.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

aid him in assessing the impact Meredith's move would have on the children.¹⁴⁸ Dr. Cutler had prepared a report based on interviews with the children, and John attached the report to his moving papers.¹⁴⁹ In his report, Dr. Cutler stated that the children had mixed feelings about the move and had indicated to him that they preferred to spend more time with John. In Dr. Cutler's opinion, relocating the children would be harmful to their emotional well-being and development and would not be in their best interests.¹⁵⁰

In terms of legal precedent in support of his motion for a hearing, John relied on a 1984 decision, *Benson v. Benson*.¹⁵¹

In response to John's motion, Meredith submitted an affidavit in support of the move. She stated that she had a career opportunity in Arizona that had the potential for a better lifestyle for herself and the children.¹⁵² She also stated that her fiancé had purchased a home in Arizona and a lake cabin in Minnesota.¹⁵³ Meredith proposed a new visitation schedule that included return visits to Minnesota during the summer months to accommodate extended visitation for the children with John.¹⁵⁴ As legal precedent in support of denying John an evidentiary hearing, Meredith relied on a 1991 decision, *Geiger v. Geiger*.¹⁵⁵

148. *Id.*

149. *Id.*

150. *Id.*

151. 346 N.W.2d 196, 198-99 (Minn. Ct. App. 1984) (reversing the district court's finding that the appellant had failed to make a *prima facie* showing against removal). The appellate court found serious questions surrounding the respondent's impending marriage, the children's new home, and the lack of necessary medical care for one of the children. *Id.*

152. *Silbaugh*, 543 N.W.2d at 640.

153. *Id.*

154. *Id.*

155. 470 N.W.2d 704, 709 (Minn. Ct. App. 1991), *pet. for rev. denied* (Minn. Aug. 1, 1991) (affirming the district court's ruling that the appellant had failed to make a *prima facie* case against removal). The court held that, aside from the natural adjustments and difficulties of moving, the appellant had "cited no specific facts to show how the move would be against the children's best interests." *Id.*; see *Knott v. Knott*, 418 N.W.2d 505, 507, 509 (Minn. Ct. App. 1988) (upholding the district court's denial of an evidentiary hearing despite affidavits by appellant and two doctors stating that the child's asthma would be temporarily exacerbated by the move; the district court had reasoned that adequate medical care could be arranged in the child's new state); *Madgett v. Madgett*, 360 N.W.2d 411, 413 (Minn. Ct. App. 1985) (holding that the absence of any "indication of poor performance in school, increased illness, [or] reports from psychologists, teachers, or friends" was fatal to appellant's attempt to make a *prima facie* showing against removal).

The trial judge reviewed the various documents and ruled that John had failed to establish a *prima facie* case of endangerment. Meredith's request to relocate was granted.¹⁵⁶ In his ruling, the trial judge disregarded Dr. Cutler's opinion regarding the impact the move would have on the children. The judge found that Dr. Cutler's report was inconsistent with the "customary and ethical practice" of custody evaluations and contrary to the couple's divorce decree.¹⁵⁷ John appealed.

In an unpublished opinion, a three-judge Minnesota Court of Appeals' panel *reversed* the trial judge.¹⁵⁸ They found that John's affidavits established a *prima facie* showing of endangerment. A hearing where he could more fully present his evidence, including the testimony of Dr. Cutler regarding the impact relocation would have on the children, was ordered.¹⁵⁹ The court found *inter alia* that the trial judge had improperly weighed Dr. Cutler's report when it considered other outside contrary evidence.¹⁶⁰

Meredith petitioned the Minnesota Supreme Court and asked that it review the Court of Appeals' decision.¹⁶¹ Meredith's petition for review was granted.

The supreme court *reversed* the court of appeals.¹⁶² It held that the trial judge did not err in rejecting Dr. Cutler's opinion, reasoning that the rejection was within the trial judge's discretion.¹⁶³ Further commenting on the report, the court stated that because it was produced without the knowledge or consent of Meredith, it was "arguably inconsistent with the provisions of the judgment and decree."¹⁶⁴ The court also said that while Dr. Cutler's report portrayed strong and loving relationships between the Silbaugh children and John and his new wife, it failed to provide information about potential problems in Meredith's

156. *Silbaugh*, 543 N.W.2d at 640.

157. *Id.*

158. *Silbaugh v. Silbaugh*, No. CO-94-1739, 1994 WL 705384 (Minn. Ct. App. Dec. 20, 1994). This opinion is designated as unpublished and may not be cited except as provided by Minn. St. Sec. 480A.08(3).

159. *Silbaugh*, 543 N.W.2d at 640.

160. *Id.* at 640-41.

161. *Id.* at 641.

162. *Id.* at 642.

163. *Silbaugh*, 543 N.W.2d at 641 (relying on *Reinhardt v. Colton*, 337 N.W.2d 88 (Minn.1983)).

164. *Id.*

home.¹⁶⁵ The court observed the report could not do this because Dr. Cutler did not have any contact with Meredith.¹⁶⁶ The court suggested that Dr. Cutler's report described the kind of stress and anxiety inherent for children in any move to a new locality and diminution of contact with one parent, which the court indicated is insufficient to trigger a change in custody.¹⁶⁷

The court said that any geographic change inevitably creates some anxiety for children, however, evidence of the disruption typically associated with such a move is not sufficient to overcome the *Auge* presumption that removal is in the best interests of the children.¹⁶⁸ It noted that the "bare allegations" of alcohol abuse were not sufficient to establish "endangerment to the child's physical or emotional health,"¹⁶⁹ and concluded that the allegation that Meredith's move was intended to interfere with John's visitation rights was not supported by John's affidavits.¹⁷⁰

Silbaugh and other decisions have cemented Minnesota's liberal relocation standard into the everyday practice of family lawyers. When the custodial parent seeks to move the child or children to a different state, visitation arrangements such as longer summer or holiday visits and regular telephone and mail contact are viewed as appropriate alternatives.¹⁷¹

Shifting from the local to the national scene, the leading

165. *Id.*

166. *Id.*

167. *Cf. In re Marriage of Sheley*, 895 P.2d 850, 856 (Wash. Ct. App. 1995), *overruled on other grounds by In re Marriage of Littlefield*, 940 P.2d 1362, 1371 (Wash. 1997); Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 U. LOUISVILLE J. FAM. LAW 791, 799 (1992).

168. *Silbaugh*, 542 N.W.2d at 642.

169. *Id.*; *see also Sefkow v. Sefkow*, 427 N.W.2d 203 (Minn. 1988).

170. *Silbaugh*, 542 N.W.2d at 642.

171. *See, e.g., Danielson v. Danielson*, 393 N.W.2d 405, 407-08 (Minn. Ct. App. 1986) (concluding extended summer visitation and other opportunities for visitation were reasonable and adequate ways to maintain parent-child relationship); *Meyer v. Meyer*, 346 N.W.2d 369, 372 (Minn. Ct. App. 1984) (arranging alternative reasonable visitation schedule including regular telephone calls and extended summer and holiday visits). In *Auge v. Auge*, the court observed:

[T]he alternative of uninterrupted visits of a week or more in duration several times a year, where the [non-custodial parent] is in constant and exclusive parental contact with the children and has to plan and provide for them on a daily basis, may well serve the [parent-child] relationship better than the typical weekly visit which involves little if any exercise of real [parental] responsibility.

334 N.W.2d 393, 398 (Minn. 1983).

proponent of liberal relocation is Dr. Judith S. Wallerstein.¹⁷² Her influential studies have concluded that custody should not be changed unless it is necessary to protect the child.¹⁷³ She has asserted that the cumulative body of social science research does not support the presumption that frequent and continuing access to both parents lies at the core of the child's best interest.¹⁷⁴

Dr. Wallenstein argues the "centrality of the well-functioning custodial parent-child relationship as the protective factor during the post-divorce years."¹⁷⁵ She says that "when courts intervene in ways that disrupt the child's relationship with the custodial parent, serious psychological harm may occur to the child as well as to the parent."¹⁷⁶ Courts and commentators have generally accepted the reliability of her research.¹⁷⁷

Recently, Dr. Wallenstein's research has come under critical scrutiny. In an article published in 2000, Dr. Richard A. Warshak states that "critical reading of over seventy-five studies in the social science literature, including Wallerstein's earlier reports, generally supports a policy of encouraging both parents to remain in close

172. Judith S. Wallerstein, Ph.D., founded the Center for the Family in Transition in Marin County, California in 1980 and served as its executive director from 1980 until 1993. She has researched and written extensively on the impact of divorce on children. See, e.g., JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE 297, 301 (1989); JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980) (setting forth Dr. Wallerstein's theories); Joan Berlin Kelly & Judith S. Wallerstein, *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, 46 AM. J. ORTHOPSYCH. 20 (1976); Judith S. Wallerstein & Joan Berlin Kelly, *The Effects of Parental Divorce: The Adolescent Experience*, in 3 THE CHILD IN HIS FAMILY: CHILDREN AT PSYCHIATRIC RISK 479 (1974); Judith S. Wallerstein & Joan Berlin Kelly, *The Effects of Parental Divorce: Experiences of the Child in Later Latency*, 46 AM. J. ORTHOPSYCH. 256 (1976); Judith S. Wallerstein & Joan Berlin Kelly, *The Effects of Parental Divorce: Experiences of the Preschool Child*, 14 J. AM. ACAD. CHILD PSYCH. 600 (1975); Judith S. Wallerstein, *The Long Term Effects of Divorce on Children: A Review*, 30 J. AM. ACAD. CHILD & ADOLESCENT PSYCH. 349 (1991).

173. Wallerstein & Tanke, *supra* note 106, at 310, 318.

174. *Id.* at 311.

175. *Id.*

176. *Id.*

177. See, e.g., *In re Marriage of Burgess*, 913 P.2d 473 (Calif. 1966). Professor Judith S. Wallerstein submitted an *amicus curiae* brief to the California Supreme Court in this relocation case. *Id.* at 483 n.11. The *amicus* brief later appeared in slightly revised form under the title, "To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce." Wallerstein & Tanke, *supra* note 106, at 310.

proximity to their children.”¹⁷⁸ He contends that Professor Wallerstein has ignored the “broad consensus of professional opinion, based on a large body of evidence, that children normally develop close attachments to both parents, and that they do best when they have the opportunity to establish and maintain such attachments.”¹⁷⁹ He claims that in earlier research, Dr. Wallerstein, recognized that the child’s need for continuity of emotional bonds meant the need for continuity of relations with both parents, and is puzzled because she now interprets “the same research results as supporting the view that courts should foster continuity in the child’s relationship with the mother but not with the father [where] the scientific literature does not justify it.”¹⁸⁰ He also questions Dr. Wallerstein’s continued reliance on old research, conducted at a time when children saw relatively little of their fathers after divorce, where recent studies “document a change since the 1970s and early 1980s with greater involvement of divorced fathers with their children.”¹⁸¹

Dr. Warshak asserts that Dr. Wallerstein has excluded from her research “many studies which repeatedly demonstrated a link between frequency of children’s contact with divorced fathers and children’s behavior, emotional health, satisfaction with custodial arrangements, and academic achievement.”¹⁸² He attacks Dr. Wallerstein’s assumption that the relocation will be rewarding for the relocating parent, suggesting that courts should consider the very real possibility that the relocation may not bring the anticipated benefits:

The new relationship may fail. Graduate school may not be what the parent expected. The new job could be short-lived. Relationships with extended family can become strained. And the children’s difficulties adjusting to the move and separation from their other parent might cast a

178. Richard A. Warshak, *Social Science and Children’s Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83, 84 (2000). Dr. Warshak is a clinical, consulting, and research psychologist in private practice and Clinical Professor at the University of Texas Southwestern Medical Center at Dallas, Texas.

179. *Id.* at 85, n.9 (citing RICHARD A. WARSHAK, *THE CUSTODY REVOLUTION* (1992); HENRY B. BILLER, *FATHERS AND FAMILIES: PATERNAL FACTORS IN CHILD DEVELOPMENT* (1993); *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* (Michel E. Lamb ed., 1997)); *see also* ROSS D. PARKE, *FATHERS* (1981) (for reviews of this literature).

180. Warshak, *supra* note 178, at 86.

181. *Id.*

182. *Id.* at 90.

pall on the parent's satisfaction with the new circumstances. In the event that the relocation disappoints the custodial parent, the children could experience the diminished parenting Wallerstein refers to, without the protective buffering effect of frequent contact with the non-custodial parent.¹⁸³

Other critics have attacked Dr. Wallerstein's research as anecdotal, and without scientific sampling or rigorous "double-blind" methodologies to ensure correction for any researcher bias.¹⁸⁴ Moreover, they contend that her subjects are not necessarily typical because they come from predominantly white, upper middle class and are well educated, which raises questions about application of her findings to other groups.¹⁸⁵

It is apparent that the impact on a child's development where the custodial parent is relocating is open to serious scientific disagreement. Consequently, where a child has a close and loving relationship with both parents, courts should hesitate to automatically permit either parent to "win" the child because of an unsupported supposition in favor of either parent based on social science data. The paramount consideration in a child custody decision is the child's best interests, not those of the child's parents. Given the absence of reliable scientific support for either parent, Minnesota's recent decision to encourage couples to develop a parenting plan that can mandate the use of the "best interests" test where relocation becomes an issue, is clearly a step in the right direction.¹⁸⁶

VI. THE CONSTITUTIONAL RIGHT TO TRAVEL—MINNESOTA'S PERSPECTIVE

Historically, custodial parents could not relocate outside Minnesota with a minor child without the consent of the custodial parent or a court order.¹⁸⁷ Courts feared that once the custodian was outside the state that they would lose jurisdiction to provide the

183. *Id.* at 99.

184. *See* <http://www.divorceinfo.com/judithwallerstein.htm#Limitations> (last visited August 31, 2001).

185. *Id.*

186. MINN. STAT. § 518.1705 (2000) (parenting plan can direct the best interest standard to govern relocation if both parties are represented by counsel or were fully informed, the agreement was voluntary and the parents were aware of its implications).

187. *See, e.g., Eberhart v. Eberhart*, 153 Minn. 66, 189 N.W. 592 (1922).

non-custodial parent with access to the child. The question of the constitutionality of such a procedure was not discussed in the early decisions.¹⁸⁸

During the last quarter century, however, the constitutional issues surrounding relocation have been discussed in several articles¹⁸⁹ and raised in various decisions.¹⁹⁰ For example, in *Jaramillo v. Jaramillo*,¹⁹¹ the New Mexico Supreme Court held that a state may not impose a burden on a relocating parent that unconstitutionally impairs the relocating parent's right to travel.¹⁹² The court observed, "[t]his right is so deeply ingrained in American law that it certainly needs no elaboration by the court."¹⁹³

In *Watt v. Watt*,¹⁹⁴ the Wyoming Supreme Court held unconstitutional a trial judge's modification of a divorce decree that changed custody due to the intrastate relocation of the custodial parent.¹⁹⁵ At the time of the couple's divorce, the trial court had imposed a restriction of an automatic change of custody

188. *Id.*

189. See, e.g., Blair Hoffman, Note, *Restrictions on a Parent's Right to Travel in Child Custody Cases: Possible Constitutional Questions*, 6 U.C. DAVIS L. REV. 181 (1973); Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 67 (1995-96); Paula M. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625 (1985-86); Tabitha Sample & Teresa Reiger, *Relocation Standards and Constitutional Considerations*, 10 J. AM. ACAD. MATRIMONIAL LAWYERS 229 (1998); Edward Siviv, Note, *Residence Restrictions on Custodial Parents: Implications for the Right to Travel*, 12 RUTGERS L.J. 341 (1981); Anne L. Spitzer, *Moving and Storage of Post-Divorce Children: Relocation, the Constitution and the Courts*, 1985 ARIZ. ST. L.J. 1 (1985).

190. See, e.g., *Jones v. Helms*, 452 U.S. 412, 418 (1981) (describing the right to travel as a privilege of national citizenship); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (stating that although not explicitly mentioned in the Constitution, the right to travel is a fundamental concept firmly established and repeatedly recognized), *overruled in part* by *Edelman v. Jordan*, 415 U.S. 651 (1974); *Edwards v. California*, 314 U.S. 160, 172 (1941) (recognizing fundamental right to travel using Commerce Clause); *Staab v. Hurst*, 868 S.W.2d 517, 522 (Ark. Ct. App. 1994); *Day v. Day*, 711 So.2d 793 (La. Ct. App. 1998); *Yannas v. Frondistou-Yannas*, 481 N.E.2d 1153, 1158 (Mass. 1985); *Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991) (finding a presumption against removal of the child by the custodial parent unconstitutionally impairs the custodial parent's right to travel); *Pitt v. Olds*, 511 S.E.2d 60 (S.C. 1999).

191. 823 P.2d 299 (N.M. 1991).

192. *Id.*

193. *Id.* at 305 (citing *Shapiro*, 394 U.S. at 629 ("[A]ll citizens [have the right to] 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.")).

194. 971 P.2d 608 (Wyo. 1999).

195. *Id.* at 616.

if the mother moved out of the area; a year after the divorce, she petitioned to relocate so she could pursue her education.¹⁹⁶ The trial court found the automatic change of custody language improper; however, it awarded custody to the father based on the children's best interests.¹⁹⁷ The Wyoming Supreme Court stated that the trial court's action amounted to impermissible infringement of the mother's right to travel.¹⁹⁸ It ruled that there is a fundamental right to intrastate travel protected by the unenumerated rights clause of the Wyoming Constitution.¹⁹⁹

Other courts have voiced concerns about orders imposing restrictions on the custodial parent without discussing their constitutional implications. For example, the Iowa Court of Appeals in *In Re Thielges*,²⁰⁰ declared that "[w]e strongly disapprove . . . of custody provisions, whether stipulated by the parties or mandated by the court, that predetermine what future circumstances will warrant a future modification."²⁰¹

Early Minnesota family law decisions reflected the jurisdictional concerns shared with the other state courts in the nation. For example, in *Eberhart v. Eberhart*,²⁰² when the custodial parent left Minnesota with the minor child, the non-custodial parent halted child support payments. The Minnesota Supreme Court held that so long as the custodial parent remained outside Minnesota with the child, the non-custodial parent was relieved of any support obligation. No constitutional question was raised or discussed.

A quarter of a century ago, Minnesota indirectly addressed the constitutionality of relocation in *Ryan v. Ryan*.²⁰³ In that dispute, the custodial parent of a seven-year-old wanted to relocate to Ohio.²⁰⁴ She had accepted employment with the federal

196. *Id.* at 610.

197. *Id.*

198. *Id.*

199. *Id.*

200. 623 N.W.2d 232 (Iowa Ct. App. 2000). In *Thielges*, the mother wanted to move with three children from Iowa to North Dakota, and the decree had provided that a move by either party from the children's school district "shall constitute a substantial change in circumstances regarding modification of custody of the minor children." *Id.* at 234.

201. *Id.* at 237.

202. 153 Minn. 66, 189 N.W. 592 (1922).

203. 300 Minn. 244, 219 N.W.2d 912 (1974), *reh'g denied* July 26, 1974.

204. *Id.* at 245, 219 N.W.2d at 914.

government, and began work with the Federal Bureau of Narcotics and Dangerous Drugs in Cincinnati.²⁰⁵ When her former husband rejected her relocation request, she sought judicial authorization.

Following a hearing, her request to relocate was rejected along with her former husband's motion to have custody transferred to him.²⁰⁶ In a memorandum accompanying the order, the trial judge stated that the custodian's "true reason for accepting employment in Ohio was for personal self-fulfillment."²⁰⁷ Given the financial circumstances of the parties and particularly those of plaintiff, the trial judge found no substantial improvement in the financial situation could be shown by the acceptance of the federal employment.²⁰⁸ However, the trial judge left custody with the custodian because of the child's strong preference, apparently indicated to the court during in an *in camera* proceeding.²⁰⁹ The custodial parent appealed.²¹⁰

In her argument to the Minnesota Supreme Court in *Ryan*, the custodial parent asserted that Minnesota Statute § 518.175, which forbade relocation without permission of the non-custodial parent or the court, unconstitutionally infringed on her right to travel.²¹¹ The court rejected her claim, reasoning that the decision to bar removal did not involve placing any sanctions against her. The court said that the statute imposed no conditions for the court to consider and that the sanctions imposed by the trial judge were independent of the statute. It reasoned that the sanction against

205. *Id.*

206. *Id.* at 246, 219 N.W.2d at 914.

207. *Id.* at 246-247, 219 N.W.2d at 914.

208. *Id.* at 247, 219 N.W.2d at 914.

209. Trial courts were reminded that when considering motions for removal of a child outside the jurisdiction of the state or for support of children who have been removed outside the jurisdiction of the state, they must consider, in the exercise of their discretion, the legislative mandates included in MINN. STAT. § 518.175, subs. 3-4, which provided as follows:

Subd. 3. The custodial parent shall not move the residence of the child to another state except upon order of the court or with the consent of the non-custodial parent, when the non-custodial parent has been given visitation rights by the decree. Subd. 4. Proof of an unwarranted denial of or interference with duly established visitation may constitute contempt of court and may be sufficient cause for reversal of custody.

210. *Ryan*, 300 Minn. at 247, 219 N.W.2d at 914.

211. The custodial parent relied on *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Graham v. Richardson*, 403 U.S. 365 (1971); and *Shapiro v. Thompson*, 394 U.S. 618 (1969). *Ryan*, 300 Minn. at 251-52, 219 N.W.2d at 917.

relocating was not brought into play by operation of the statute but by the exercise of the trial court's discretion. Therefore, the court found that no constitutional issue was before it.

The constitutionality of relocation was more directly considered by Minnesota's intermediate court of appeals in *LaChapelle v. Mitten*.²¹² The dispute was not, however, one involving a custodial parent seeking to relocate in a post-divorce dispute. Rather it involved the biological mother of the child, the mother's former lesbian lover, and the male whose sperm had been used to inseminate the biological mother.²¹³

The biological mother, Denise Mitten, gave birth to a child as a result of artificial insemination from sperm donated by Mark LaChapelle.²¹⁴ Mitten and her partner, Valerie Ohanian, had agreed with LaChapelle and his partner as to custody and visitation of the child.²¹⁵ When Mitten and Ohanian severed LaChapelle's visitation with the child, LaChapelle began paternity proceedings.²¹⁶ Later, when Mitten and Ohanian terminated their relationship, the parties commenced various proceedings to determine custody and visitation rights.²¹⁷ By this time, Mitten and the minor child had moved to Michigan.²¹⁸

After an extended hearing, the trial judge granted Mitten sole physical custody on the condition that she and the child leave Michigan and take up residence in Minnesota.²¹⁹

Mitten appealed alleging that the trial judge abused his discretion in conditioning sole physical custody on her return to Minnesota.²²⁰ She claimed the order violated her constitutional rights of travel, privacy and equal protection.²²¹

A three-judge court of appeals panel held that conditioning sole physical custody on Mitten returning with the infant to Minnesota from Michigan did not violate her constitutional right of travel, because the move was in the child's best interests.²²² The

212. 607 N.W.2d 151 (Minn. Ct. App. 2000), *rev. denied* May 16, 2000.

213. *Id.* at 157.

214. *Id.* at 157.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 158.

220. *Id.* at 157.

221. *Id.*

222. *Id.* at 163.

panel reasoned that once the child was returned to Minnesota, it could maintain a relationship with all of the parties who had played a role in its life: the custodial parent (her biological mother), her mother's former lesbian partner as her "emotional parent," and the sperm donor, her biological father.²²³

The court of appeals conceded that conditioning sole physical custody on the custodian's return to Minnesota raised fundamental questions regarding her right to travel, privacy, and equal protection under the Minnesota and United States Constitutions.²²⁴ It also agreed that the right to travel is inherent in the concept of our country as a federal union and a fundamental constitutional right under the federal constitution.²²⁵ It recognized that the nature of the disadvantage or hardship involved was important to the level of review of any restriction on the right to travel.²²⁶ In this dispute, the hardship imposed on the custodial parent was characterized as the loss of sole physical custody of her daughter if she failed to return to Minnesota.²²⁷

The court of appeals also recognized that requiring the custodian's return to Minnesota implicates the fundamental right to raise one's child, and it applied the strict scrutiny standard of review.²²⁸ The strict scrutiny test could be met only by a showing of a compelling state interest, which it said were the best interests of the minor child.²²⁹

In its analysis, the court relied in part on a recent ruling from the Montana Supreme Court, *In re Custody of D.M.G.*²³⁰ This dispute involved an unmarried couple that had lived together and had had two children.²³¹ Two years following the birth of the children, the relationship broke down, and the mother moved to Oregon with the children.²³² The biological father challenged the relocation and the trial judge awarded the parties joint custody and provided that the mother would have primary physical custody once she

223. *Id.* at 164.

224. *See id.* at 163.

225. *Id.* at 163.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. 951 P.2d 1377 (Mont. 1998).

231. *Id.* at 1379.

232. *Id.*

returned to Montana.²³³ If she did not relocate, custody of the children would be rotated every two years.²³⁴

The Montana Supreme Court held that the trial judge abused his discretion by effectively requiring the mother to relocate or lose custody in the absence of sufficient proof of a compelling nature to interfere with her constitutional right to travel.²³⁵ However, it asserted that the mother's constitutional right of interstate travel is qualified by the special obligations of custody, the state's interest in protecting the best interests of the children, and by the competing interests of the non-custodial parent.²³⁶ The Montana court also held that furtherance of the best interests of children may constitute a compelling state interest worthy of reasonable interference with a parent's right to travel, but the parent requesting the travel restriction must provide sufficient proof that a restriction is in the best interests of the child, although in this case, the father had not done so.²³⁷

In *LaChapelle*, the Minnesota Court of Appeals observed that the trial judge did not restrict the custodian parent's right to remain in Michigan; the judge only required that the minor child to be returned to Minnesota.²³⁸ It reasoned that any burden placed on the custodial parent's right to travel arose from her desire to remain the minor child's sole physical custodian.²³⁹

The court also agreed that parents enjoy a general freedom

233. *Id.*

234. *Id.* at 1380.

235. *Id.* The court also held that the trial judge should have applied the statutory presumption that custody should be awarded to primary care giver, who was the custodial mother. *Id.*

236. *Id.* at 1383.

237. *Id.* See also *Ziegler v. Ziegler*, 691 P.2d 773, 780 (Idaho Ct. App. 1984) (citing with approval the district court decision) ("Providing and assuring the maximum opportunities for parental love, guidance, support and companionship is a compelling state interest that . . . warrants reasonable interference with the constitutional right of travel."); *Clark v. Atkins*, 489 N.E.2d 90, 100 (Ind. Ct. App. 1986) (holding grant of custody to mother on condition she return to Indiana does not impose burden on right to travel, because (1) she remains free to go where she chooses; (2) it is only the children who must be returned to Indiana; and (3) the law has few objectives more compelling than protecting the interests of children); *Carlson v. Carlson*, 661 P.2d 833, 836 (Kan. Ct. App. 1983) ("[The custodial parent's] right to travel or even to establish residence elsewhere is limited only by her desire to retain her status as the custodial parent.").

238. *LaChapelle v. Mitten*, 607 N.W.2d 151, 164 (Minn. Ct. App. 2000), *rev. denied* May 16, 2000.

239. *Id.*

from governmental intrusion in child-rearing decisions²⁴⁰ and, although not absolute, a constitutional right to familial privacy. Where there is an allegation of interference by the state with a protected right of privacy, the court balances the interest in the privacy against the state's need to intrude on that privacy. Here, Minnesota's interest in protecting the child's best interests were considered sufficiently compelling to justify intrusion into the custodial parent's privacy in her familial relationship with the minor child.²⁴¹

Mitten had also argued that the order requiring her to return to Minnesota unfairly obligated her to move to a place she does not want to live for the convenience of the child's father and one other important adult in the child's life.²⁴² Such an order, she contended, offends the equal protection clauses of the Minnesota and United States Constitutions.²⁴³ The court of appeals also rejected this argument. It reasoned that the order did not require the custodial parent to move her home at all; it simply required that the minor child be brought back to Minnesota because this was in the child's best interests.²⁴⁴

LaChapelle did not, of course, involve relocation following divorce or application of the *Auge v. Auge* presumption. However, the constitutional issues raised in *LaChapelle* would certainly appear to implicate post-divorce relocation requests. It would be somewhat unusual if there were two relocation standards: one for divorced custodial parents and another for custodians of children born out of wedlock.

VII. CONCLUSION

In the last quarter century, society in Minnesota has changed

240. *Id.* (citing *In re Santoro*, 578 N.W.2d 369, 374 (Minn. Ct. App. 1998), *rev'd on other grounds*, 594 N.W.2d 174 (Minn. 1999); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 164-65 (citing *Carlson v. Carlson*, 661 P.2d 833, 836-37 (Kan. Ct. App. 1983) as a rejection of the mother's argument that a residency restriction in the custody decree violated equal protection because a similar restriction was not placed on the father, because the best-interests-of-the-child standard applies to both parents).

significantly.²⁴⁵ It is increasingly mobile, home to large numbers of dual-career couples with hundreds of day care centers caring for thousands of children. Women are attracted to work outside the home in growing numbers and are gaining unprecedented prominence within business and within the legal and medical professions. Increasingly, fathers are taking a more active role in their children's lives. Past assumptions regarding the role of men and women play in raising children may no longer be viable.

Courts, legislatures, and experts, struggling with the question of relocation following divorce, have not reached a consensus on the consequences of relocation on a child's future development. All agree that a relocation decision must be in a child's best interests; however, they disagree over the outcome of a relocation dispute.

Jurisdictions outside Minnesota vary on whether to begin a relocation request with a presumption favoring the custodial or non-custodial parent. Proponents favoring the custodial parent contend that a custodial parent presumption, similar to that used in Minnesota, is in the child's best interests. Those favoring the non-custodial parent contend that maintaining the status quo, absent a showing of compelling circumstances, is in the child's best interests.

Everyone recognizes that there is no easy answer to the question of allowing relocation when a custodial parent is offered a better-paying, career-enhancing job in a new location and the non-custodial parent, who has actively participated in a child's life, refuses to surrender overnight visits, regular weekend visits, dropping by the child's soccer game and attending parent-teacher conferences.

Relocation law in Minnesota has become somewhat confusing. Some of the confusion exists because the Minnesota Supreme Court has indicated it will not enforce stipulations between parents regarding the appropriate standard to apply when relocation is requested.²⁴⁶ However, this ruling appears to have been overruled by the new Parenting Plan legislation that makes it clear that a couple can agree on the legal standard to apply where relocation becomes

245. See Theresa A. Peterson, Note, *The State of Child Custody in Minnesota: Why Minnesota Should Enact the Parenting Plan Legislation*, 25 WM. MITCHELL L. REV. 1577, 1580-81 (1999).

246. *Frauenschuh v. Giese*, 599 N.W.2d 153, 159 (Minn. 1999).

an issue in the future.²⁴⁷

The *LaChapelle* decision, although decided by Minnesota's intermediate appellate court, raises troubling constitutional questions about current practice under Minn. Stat. § 518.18(d)(iv).²⁴⁸

247. Minnesota Statutes provide the following:

Subd. 7. Moving the Child to Another State. Parents may agree, but the court must not require, that in a parenting plan the factors in section 518.17 or 257.025, as applicable, will govern a decision concerning removal of a child's residence from this state, provided that:

- (1) both parents were represented by counsel when the parenting plan was approved; or
- (2) the court found the parents were fully informed, the agreement was voluntary, and the parents were aware of its implications.

Subd. 8. Allocation of Certain Expenses. (a) Parents creating a parenting plan are subject to the requirements of the child support guidelines under section 518.551.

(b) Parents may include in the parenting plan an allocation of expenses for the child. The allocation is an enforceable contract between the parents.

Subd. 9. Modification of Parenting Plans. (a) Parents may modify the schedule of the time each parent spends with the child or the decision-making provisions of a parenting plan by agreement. To be enforceable, modifications must be confirmed by court order. A motion to modify decision-making provisions or the time each parent spends with the child may be made only within the time limits provided by section 518.18.

(b) The parties may agree, but the court must not require them, to apply the best interests standard in section 518.17 or 257.025, as applicable, for deciding a motion for modification that would change the child's primary residence, provided that:

- (1) both parties were represented by counsel when the parenting plan was approved; or
- (2) the court found the parties were fully informed, the agreement was voluntary, and the parties were aware of its implications.

(c) If the parties do not agree to apply the best interests standard, section 518.18, paragraph (d), applies.

MINN. STAT. § 518.1705, subds. 7, 8, 9 (2000). One of the most significant changes in the last couple of years is the increase in the number of states that require a parent who seeks custody to file a "parenting plan." *See, e.g.,* Robert L. Gottsfield, *Relocating Andy: Remaining with the Nurturer as Guiding Principle; Impact of Relocation Statute; How to Win a Removal Case*, 36 ARIZ. ATT'Y 10, 11 (Jan. 2000) (discussing Arizona's Parenting Plan).

248. Minnesota Statutes § 518.18(d)(iv) provides that custody will not be modified unless: "the child's present environment endangers the child's physical

It would appear that the time is ripe for the Minnesota Legislature to revisit the entire issue of relocation and to the extent possible, neutralize the current state of the law. A separate neutral statute would make all relocation decisions consistent with the Parenting Plan legislation promulgated in 2000. It would remove political influence to the extent possible and best protect the interests of children.

There are, of course, many relocation models to examine. New York's *de novo* approach, Maryland's neutral effort, and drafts of Model Acts may all be helpful.²⁴⁹ It is time for a new and up-to-date legislative evaluation of post-divorce relocation. Minnesota's children deserve no less.

or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." MINN. STAT. §518.18(d) (iv) (2000).

249. Janet Leach Richards, *Children's Rights v. Parents' Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. REV. 245, 277 n.176 (1999) (citing the Proposed Model Relocation Act (American Academy of Matrimonial Lawyers (1997)), copies of which are available from the AAML office: American Academy of Matrimonial Lawyers, 150 North Michigan Avenue, Suite 2040, Chicago, Illinois 60601, phone: 312-263-6477).