OH, THE PLACES YOU’LL (POSSIBLY) GO!
RECENT CASE LAW ON
RELOCATION OF THE CUSTODIAL PARENT

David M. Cotter
Assistant Editor, Divorce Litigation

Of all the potential issues that can arise in child custody cases, one of the most difficult and complicated to resolve is whether to permit the proposed relocation of the custodial parent. The relocation of the custodial parent necessarily impacts on the strength and quality of both parents' continued relationships with the child as well as fundamentally altering the child's environment, thus requiring substantial adjustments by all parties involved. Considering the opposing interests of the parties involved and the fact-intensive nature of the issues that must be addressed in each relocation case, it is easy to understand why they are rarely settled to everyone's satisfaction.

As our society has become increasingly mobile and migratory, the number of relocation cases has continued to expand at an astounding rate. No jurisdiction has escaped the need to address this thorny custody issue and its attendant effects on a child's relationship with his or her parents. These jurisdictions have recognized the delicate nature of such decisions and have expressed their concern regarding the inherent difficulty in crafting an evenhanded result. The following passage from the New Jersey Supreme Court clearly articulates this concern:

Ideally, after a divorce, parents cooperate and remain in close proximity to each other to provide access and succor to their children. But that ideal is not always the reality. In our global economy, relocation for employment purposes is common. On a personal level, people remarry and move away. Noncustodial parents may relocate to pursue other interests regardless of the strength of the bond they have developed with their children. Custodial parents may do so only with the consent of the former spouse. Otherwise, a court application is required.

Inevitably, upon objection by a noncustodial parent, there is a clash between the custodial parent's interest in self-determination and the noncustodial parent's interest in the companionship of the child. There is rarely an easy answer or even an entirely satisfactory one when a noncustodial parent objects. If the removal is
denied, the custodial parent may be embittered by the assault on his or her autonomy. If it is granted, the noncustodial parent may live with the abiding belief that his or her connection to the child has been lost forever.


The ability of a custodial parent to relocate was last addressed in this publication over eight years ago. *See* Nadine E. Roddy, *Stabilizing Families in a Mobile Society: Recent Case Law on Relocation of the Custodial Parent*, 8 Divorce Litigation 141 (August 1996). While the state of relocation law has not dramatically changed in the intervening years, the sheer volume of recent relocation cases warrants the revisiting of this issue. This article will examine recent decisions concerning the relocation of the custodial parent in sole or primary physical custody arrangements as well as the proposed relocation of a parent in cases involving a joint custodial arrangement, including both joint legal custody and joint physical custody. In addition, since this publication last addressed the issue of relocation, there has been a recent trend to apply some type of best-interests-of-the-child standard to resolve relocation disputes. This trend is evident in both recent court decisions as well as state statutes governing a parent's right to relocate.

I. Relocation and the Constitutional Rights of Parents

Before considering the complex factual issues that are a part of any relocation case, it is necessary to address the potential for relocation decisions to infringe on certain constitutional rights of the parties involved. A court's decision whether or not to permit relocation may have the effect of infringing on a custodial parent's fundamental right to travel. The United States Supreme Court has long recognized that there exists a protected constitutional right for citizens to travel freely between the states. *See Jones v. Helms*, 452 U.S. 412, 417-18 (1981) ("It is, of course, well settled that the right of a United States citizen to travel..."
from one State to another and to take up residence in the State of his choice is protected by the Federal Constitution."; *Saenz v. Roe*, 526 U.S. 489 (1999) (likewise recognizing constitutional right to travel). A party's constitutionally protected right to travel can only be infringed upon if there exists a compelling state interest. *Jones*, 452 U.S. at 415-16. This potential infringement is compounded by another constitutional right implicated in relocation cases—the natural parent's fundamental liberty interest in the care, custody, and control of his or her children. *See Troxel v. Granville*, 530 U.S. 57 (2000); *Santosky v. Kramer*, 455 U.S. 745 (1982).

A court's decision that a parent loses custody of his or her child due to a proposed relocation obviously infringes upon that parent's fundamental right to travel, requiring a compelling state interest to support such a decision. However, a handful of courts have essentially ducked the issue by holding that a parent's constitutional right to travel is not infringed upon even if custody must be surrendered. These courts have reached the somewhat specious decision that a parent's right to travel is not compromised since the parent is still free to relocate, albeit without retaining custody of his or her children. *See, e.g.*, *In re C.R.O.*, 96 S.W.3d 442 (Tex. App. 2002) (mother's constitutional right to travel not affected by order prohibiting her from moving away from the same geographic location of the father where order did not prevent mother from relocating without the children).

The majority of courts, however, have been more forthright and have recognized that if a parent is required to forfeit custody in order to exercise his or her right to travel, the parent's right has necessarily been infringed upon and that such an infringement is only allowable if there exists a compelling state interest. In general, based on the need for a compelling state interest to infringe on these rights, most courts have adopted some form of a balancing standard which weighs the custodial parent's constitutional rights against the state's interest in protecting the best interests of the child.

The validity of such a balancing test was recently addressed by the Court of Special Appeals of Maryland in *Braun v. Headley*, 131 Md. App. 588, 750 A.2d 624, cert. denied, 359 Md. 669, 755 A.2d 1139 (2000), cert. denied, 531 U.S. 1191 (2001). In *Braun*, the mother, who was the custodial parent, moved to Arizona with the parties' child. In response, the father petitioned for sole custody of the child. Relying on Maryland precedent that held that the relocation of a custodial parent may justify modification of the custody award, the trial court ultimately found that it was in the child's best interests that custody be awarded to the father. The wife appealed this modification of custody, arguing that the trial court's decision, premised on the principle that her relocation could in and of itself constitute a material change in circumstances, necessarily infringed upon her constitutional right to travel.

The Court of Special Appeals of Maryland noted the fundamental nature of a party's constitutional right to interstate travel and found that this right could not be ignored in relocation cases. However, after reviewing relocation decisions from other jurisdictions addressing this right, the court also noted that the right to travel is not absolute, but that it is qualified "and must be subject to the state's compelling interest in protecting the best interests of the child by application of the best interests standard." 750 A.2d at 632. The court in *Braun* found that the mother's constitutional right to travel could properly be balanced against the best interests of the child and that the mother's right did not operate to place her interests above that of the other parent.

There is no constitutional infirmity in giving equal status, in determining the child's best interests, to (1) the custodial parent's right to travel, and the benefit to be given the child from remaining with the custodial parent; and
(2) the benefit from the non-custodial parent’s exercise of his right to maintain close association and frequent contact with the child.

*Id.* at 635. The court's decision in *Braun* was appealed to both the Maryland Court of Appeals and the United States Supreme Court. Both courts denied certiorari, allowing the court of special appeals' decision and its balancing test to stand. Thus, the court's conclusion that the best-interests-of-the-child standard that was currently in use in Maryland for the resolution of relocation cases was sufficient to protect the mother's right to travel was allowed to stand by the higher courts. *Id.* at 636; *In re Custody of D.M.G. & T.J.G.*, 287 Mont. 120, 951 P.2d 1377 (1998) (child's best interests in being loved and supported by both natural parents may constitute compelling state interest allowing infringement on right to travel; however, these interests must be balanced and travel restriction must be shown to be in child's best interests).

A minority of jurisdictions addressing the effect of a parent's constitutional right to travel have failed to adopt some form of a balancing test, instead finding that the best interests of the child always control the outcome in relocation cases, regardless of the custodial parent's right to travel. See, e.g., *Weiland v. Ruppel*, 139 Idaho 122, 75 P.3d 176 (2003) (parent's constitutional rights may have to be forgone in favor of best interests of child); *LaChappelle v. Mitten*, 607 N.W.2d 151, 163 (Minn. Ct. App.), cert. denied, *Mitten v. LaChapelle*, 531 U.S. 1011 (2000) (the best interests of a child constitute a compelling state interest and allow "burdening a parent's fundamental right to travel"). Much like the jurisdictions that found no infringement on a parent's right to travel, these jurisdictions also essentially minimize a parent's constitutional right in order to avoid addressing the difficult issues present in relocation cases. On that basis, the constitutional analysis of these courts is at best unconvincing.

Conversely, at least one court has gone to the other extreme and has found that a parent's constitutional right to travel may actually serve to trump the best interests of a child in a relocation case. In *Watt v. Watt*, 971 P.2d 608 (Wyo. 1999), the mother petitioned to modify the initial custody order so that she could relocate with the children to another city in Wyoming. The order provided that custody would automatically transfer to the father if the mother moved more than 50 miles away from where the father resided. The reason for the mother's proposed move was to attend graduate school, which was located over 50 miles away from the father. The trial court concluded that the automatic custody transfer provision was improper but still awarded custody of the children to the father after applying a best-interests-of-the-children test.

On appeal, the mother argued that the trial court's decision to modify custody necessarily infringed upon her fundamental right to travel under the Wyoming Constitution. The Supreme Court of Wyoming agreed and reversed the trial court's decision. The court concluded that the husband, as the party seeking to modify the initial custody award, had the burden to establish that a material change in circumstances had occurred. The court noted that in interstate relocation cases Wyoming has recognized "a strong presumption in favor of the right of a custodial parent to relocate with her children" if the custodial parent has a good-faith motive for the move and the noncustodial parent can maintain reasonable visitation. *Id.* at 614. The court also noted that relocation by itself does not constitute a change in circumstances.

Turning to the wife's constitutional argument, the court acknowledged that the United States Supreme Court has long recognized a fundamental right to travel. The court noted that the Wyoming Constitution similarly recognized such a
fundamental right and that this right should not be infringed upon.

The constitutional question posed is whether the rights of a parent and the duty of the courts to adjudicate custody serve as a premise for restricting or inhibiting the freedom to travel of a citizen of the State of Wyoming and of the United States of America. We hold this to be impossible. The right of travel enjoyed by a citizen carries with it the right of a custodial parent to have the children move with that parent. This right is not to be denied, impaired, or disparaged unless clear evidence before the court demonstrates another substantial and material change of circumstance and establishes the detrimental effect of the move upon the children. While relocation certainly may be stressful to a child, the normal anxieties of a change of residence and the inherent difficulties that the increase in geographical distance between parents imposes are not considered to be "detrimental" factors.

An inhibition upon the right to travel is never imposed upon the non-custodial parent who is free to move at will despite the location of the children. The motives of the non-custodial parent will not be questioned by the court with respect to such relocation, and the custodial parent has no power to inhibit it. The inherent inequities of such a situation stand as an additional reason that courts have concluded that custodial parents should be permitted to move with their children.

*Id.* at 615-16. In light of the custodial parent's constitutional right to travel, the court concluded that a custodial parent's relocation could never serve as the only basis for a change in custody without intruding on this right.

While jurisdictions that allow the best interests of a child to trump a parent's constitutional rights go too far in one direction, the court's decision in *Watt* clearly goes too far in the other direction. Although the jurisdictions that essentially allow the best interests of the child to control fail to give proper consideration to the constitutional rights of the parents, the court's decision in *Watt* clearly swings too far in granting primacy to a parent's right to travel. It is clear that this fundamental right must be considered in relocation cases; however, the majority rule which balances these potentially conflicting interests properly ensures that a court will look at all of the relevant interests without putting its thumb on either side of the scale.

II. Relocation by Parent with Sole or Primary Physical Custody

Most relocation cases involve situations where one parent has been awarded sole custody or primary physical custody of a child. These cases fundamentally differ from those involving joint or shared physical custody. Relocation cases may be filed either by the custodial parent seeking permission from the court to relocate or by the noncustodial parent in an attempt to block the proposed relocation. In resolving these disputes, jurisdictions often differ on the burden of proof involved and which party bears that burden. Generally, these jurisdictions all agree that a determination of the best interests of the child is essential; however, the states vary as to whose burden it is to establish whether a proposed relocation is in fact in the best interests of a child. Due to these differences, the outcome of a relocation case could fluctuate wildly depending on whether the burden is on the custodial or the noncustodial parent. In recent years, there has been a trend toward the application of a best-interests standard in resolving relocation cases, either by a court decision or by the enactment of a statute setting forth the applicable relocation standard. It

A. Presumption in Favor of Relocation

Several jurisdictions have adopted a relatively permissive standard in resolving relocation disputes. In these jurisdictions, courts apply a presumption in favor of the custodial parent's right to relocate with a child, with the burden on the noncustodial parent to establish that the move is not in the child's best interests. Representative of this permissive approach is the Arkansas Supreme Court's decision in Hollandsworth v. Knyzewski, 353 Ark. 470, 109 S.W.3d 653 (2003), where the court rejected a more restrictive burden of proof and instead adopted a standard which treats the relocation decision of the custodial parent as presumptively correct.

The wife in Hollandsworth was awarded primary custody of the parties' children, with the husband receiving visitation rights. On their own, the parties agreed that the father could have more visitation than provided in the order and allowed him to spend three and one-half days per week with the children. Two months after the parties' divorce, the mother remarried. Her new husband was in the Army, was stationed in Kentucky, and maintained a residence in Tennessee. Three months after the parties' divorce, the mother informed the father that she was moving to Tennessee with the children. The father filed a petition seeking to enjoin the mother's relocation as well as seeking primary custody of the children, and the mother petitioned for permission to relocate.

The trial court granted the husband's petition and ordered a modification of custody. The trial court found that the burden was on the mother to demonstrate "a real advantage to herself and to the minor children" resulting from the planned relocation. 109 S.W.3d at 656. The trial court found that the mother failed to carry this burden based primarily on the interference the move would cause on the father's relationship with the children. The court also discounted the benefits of the relocation, including the stability and income provided by the mother's new husband.

The Arkansas Court of Appeals reversed the trial court's decision, finding that the facts of the case established that there were real advantages to the children from the mother's proposed relocation, and the husband appealed.

The Supreme Court of Arkansas also found that the trial court's decision to modify custody was in error; however, the supreme court held that the real-advantage test was not the correct standard to be applied in relocation cases. The court reached this conclusion only after reviewing the relevant standards employed by other jurisdictions to settle relocation disputes. The court noted that jurisdictions tend to follow one of three possible standards.

As our society has become more and more mobile, some courts around the country have imposed a presumption against relocation, while others have imposed a presumption in favor of relocation, and still others have simply applied a best-interest analysis.

Id. at 658.

Turning to Arkansas law, the court concluded that the court of appeals had relied on the wrong standard in reaching the determination that the
father should not be the custodial parent. The court noted that the "real-advantage" standard employed by both the trial court and the court of appeals stemmed from several earlier court of appeals' decisions. See Staab v. Hurst, 44 Ark. App. 128, 868 S.W.2d 517 (1994); Hickmon v. Hickmon, 70 Ark. App. 438, 19 S.W.3d 624 (2000). The supreme court rejected the rule from these earlier lower court decisions and instead announced a presumption in favor of relocation for custodial parents with primary custody. The court found that the court of appeals had ignored earlier supreme court authority which relied on the principle that "[t]he custodial parent is ordinarily authorized to relocate to another state and take the child with him or her." Hollandsworth, 109 S.W.3d at 663 (citing Walter v. Holman, 245 Ark. 173, 431 S.W.2d 468 (1968)). The court expressly overruled the court of appeals' decisions and set forth the following standard for use in relocation cases:

Historically, this court has recognized the right of the custodial parent to relocate and to relocate with his or her children, and we adhere to that determination in this case. Today, we hold that relocation alone is not a material change in circumstance. We pronounce a presumption in favor of relocation for custodial parents with primary custody. The noncustodial parent should have the burden to rebut the relocation presumption. The custodial parent no longer has the obligation to prove a real advantage to herself or himself and to the children in relocating.

Hollandsworth, 109 S.W.3d at 663.

Based on the new standard promulgated in Hollandsworth, the court held that the wife should be permitted to relocate out of state with the children. The court found that there was no evidence presented that the relocation would be detrimental to the children and that the mother had a valid reason for wanting to move. The court also noted that the father would be able to maintain sufficient visitation with the children and that the mother was willing to comply with the new visitation schedule.

A similar presumption in favor of the custodial parent's right to relocate can be found in the Oklahoma Supreme Court's decision in Kaiser v. Kaiser, 23 P.3d 278 (Okla. 2001). In Kaiser, the mother was named the custodial parent, with the father receiving visitation rights pursuant to a final judgment for divorce. The mother subsequently sought the court's permission to move out of state with the parties' child, as she had accepted a new job which offered higher pay and a greater chance for advancement. The mother also alleged that the proposed move would be beneficial to the child, offering enhanced educational and cultural opportunities. The trial court concluded that the harm that would be caused by decreased interaction with the father outweighed any benefits from the proposed relocation and denied the mother's request to move.

Due to the mother's compliance with the trial court's order, the mother lost her job opportunity out of state during the pendency of her appeal. Despite this fact, the Supreme Court of Oklahoma proceeded with the appeal, even though it was argued that the mother's appeal had become moot, because it was possible that the mother would have other job opportunities out of state. The court found that the trial court had erred in not allowing the relocation and reversed its decision.

On appeal, the mother argued that she had a statutory right to change the residence of the child. The statutory language relied on by the mother reads as follows:

A parent entitled to the custody of a child has a right to change his residence, subject to the power of the district court to restrain a
removal which would prejudice the rights or welfare of the child.

Okla. Stat. Ann. tit. 10, § 19. While the statutory language had apparently been the law in Oklahoma for over 100 years, the court stated that it had never been applied before in a relocation case. The court also noted that California, Montana, and South Dakota had adopted identical provisions and that courts in those jurisdictions had interpreted the effect of this statute as giving rise to a presumption in favor of a custodial parent's decision to relocate. In re Marriage of Burgess, 13 Cal. 4th 25, 913 P.2d 473, 51 Cal. Rptr. 2d 444 (1996); In re Marriage of Paradis, 213 Mont. 177, 689 P.2d 1263 (1984); Fortin v. Fortin, 500 N.W.2d 229 (S.D. 1993). After reviewing the law of other jurisdictions, the court reached the following conclusion:

The majority of jurisdictions which have considered this subject have adopted approaches which favor the custodial parent's right to move away from the state with their child even though they do not have a presumptive right to relocate statute such as 10 O.S. 1991 § 19.99. While the relevant statutory enactments which are placed at issue in those cases vary widely from state to state and some states have no applicable statutes, the decisions are generally based on judicial recognition of the post-divorce new family unit, and stability and continuity of the child's relationship with his primary custodian as the most important factor affecting the child's welfare. These courts also recognize that the well-being of the child is fundamentally interrelated with the well-being of the custodial parent, and that parent is the best person to make decisions affecting the child and the new family group, such as where they will reside. The courts therefore accord those childrearing decisions deference, and hold that judicial intervention in that decision making process should be limited to only the most extreme circumstances. We find the reasoning of these courts persuasive in our effort to establish a standard for determination of relocation actions.

Kaiser, 23 P.3d at 284-85. Based on the conclusions it drew from the law of other jurisdictions, the court held that the custodial parent had the presumptive right to relocate and placed the burden on the objecting parent to prove that the effect of the proposed move would adversely affect the child to such a degree that a transfer of custody was warranted.

In a relocation case the noncustodial parent seeking to restrain the custodial parent from moving must meet a heavy burden to show that circumstances justify reopening the question of custody. The custodial parent's decision to move from Oklahoma to a different location with the child is not in itself a change of circumstances which will justify a change of custody. The dispositive issue is not the decision to relocate, for the custodial parent has the presumptive right under 10 O.S. 1991 § 19 to move with the child. The dispositive issue is the fitness of the custodial parent and whether the child will be placed at risk of specific and real harm by reason of living with the custodial parent in the new location.

Id. at 286-87. It should be noted that much of the out-of-state authority relied on by the court in Kaiser is no longer valid. As discussed fully in Part II(B), the California Supreme Court has recently modified the rule announced in Burgess. Additionally, both Montana and South Dakota have removed this presumption by statutes. Montana has repealed its version of the statute relied on by the Kaiser court. South Dakota, while retaining this statutory language, has recently enacted more specific statutes governing relocation which seemingly place the burden of proof on the


B. Best Interests of the Child

More commonly, jurisdictions do not presume that relocation should be allowed and decide disputes based solely on the effect of the move on the child's best interests. Generally, the burden is placed on the relocating parent to establish that the proposed move is in the best interests of the child. Often, the relocating parent must also demonstrate a good-faith or legitimate reason for the proposed move. Additionally, a small number of jurisdictions have seemingly placed the burden on both parents to demonstrate why a proposed relocation is or is not in the best interests of the child.

There has been a recent trend toward the application of a best-interests standard in resolving relocation cases. The effect of this trend has been to require a thorough analysis of the interests of the children involved, usually with the help of a lengthy list of factors to be considered, and necessarily implies that the resolution of relocation cases has become exceptionally fact-specific. While this trend toward focusing on the best interests of the child has had a liberalizing effect in certain jurisdictions, see Tropea v. Tropea, 87 N.Y.2d 727, 665 N.E.2d 145, 642 N.Y.S.2d 575 (1996), this trend has also had the opposite effect in other places, resulting in a stricter relocation standard in those states.

A recent example of this trend is the California Supreme Court's decision in In re Marriage of LaMusga, 32 Cal. 4th 1072, 88 P.3d 81, 12 Cal. Rptr. 3d 356 (2004). After a contentious custody battle, the parties were awarded joint legal custody of their two children, with the mother being awarded primary physical custody. Several years later, the mother sought to relocate with the children to Ohio. A child custody evaluation was performed which established that the father's relationship with the children would deteriorate after the relocation and that the mother's previous conduct indicated that she would not be supportive of the father's continued relationship with the children. The trial court found that, although the mother's proposed relocation was not made in bad faith, the effect of the move would be detrimental to the welfare of the children because it would hinder frequent and continuing contact between the children and the father. The trial court held that if the mother chose to relocate, primary physical custody of the children would transfer to the father.

The trial court's decision was reversed by the California Court of Appeal. The court of appeal relied on an earlier California Supreme Court decision, In re Marriage of Burgess, 13 Cal. 4th 25, 913 P.2d 473, 51 Cal. Rptr. 2d 444 (1996). In Burgess, the Supreme Court of California held that
in relocation cases there was no requirement that the custodial parent demonstrate that the proposed relocation was "necessary." *LaMusga*, 12 Cal. Rptr. 3d at 367. Instead, the burden is on the noncustodial parent to prove that a change of circumstances exists, warranting a change in the custody arrangement. *Id.* The supreme court also held that the "paramount need for continuity and stability in custody arrangements . . . weigh heavily in favor of maintaining ongoing custody arrangements." *Id.* at 371 (quoting *Burgess*, 51 Cal. Rptr. 2d at 449-50). In effect, the *Burgess* decision established a presumption in favor of the custodial parent's choice to relocate.

The court of appeal held that the trial court had failed to properly consider the mother's presumptive right as the custodial parent to change the residence of the children or the children's need for continuity and stability in the existing custodial arrangement. 12 Cal. Rptr. 3d at 371. The court of appeal also found that the trial court had "placed undue emphasis on the detriment that would be caused by the children's relationship with Father if they moved." *Id.*

The supreme court rejected the court of appeal's position that undue emphasis was placed on the detrimental effect of the proposed relocation on the father's relationship with the children. The court of appeal concluded that all relocations result in "a significant detriment to the relationship between the child and the noncustodial parent" and, therefore, no custodial parent would ever be permitted to relocate with the children so long as any detriment could be established. *Id.* at 373. The supreme court accepted the validity of the court of appeal's position but noted that the court of appeal's fears were unfounded. The supreme court stated that "a showing that a proposed move will cause detriment to the relationship between the children and the noncustodial parent" will not necessarily mandate a change in custody. *Id.* Instead, a trial court has discretion to order such a change in custody even though some detriment will be caused as long as such a change is in the best interests of the child. *Id.* The supreme court explained its holding as follows:

The likely consequences of a proposed change in the residence of a child, when considered in the light of all the relevant factors, may constitute a change of circumstances that warrants a change in custody, and the detriment to the child's relationship with the noncustodial parent that will be caused by the proposed move, when considered in light of all the relevant factors, may warrant denving a request to change the child's residence or changing custody. The extent to which a proposed move will detrimentally impact a child varies greatly depending upon the circumstances. We will generally leave it to the superior court to assess that impact in light of the other relevant factors in determining what is in the best interests of the child.

*Id.* at 374-75.

In *LaMusga*, the Supreme Court of California has retreated from its much broader decision in *Burgess*. In *Burgess*, the court essentially established a presumption in favor of maintaining a custody arrangement in the interest of a child's paramount need for continuity and stability. In *LaMusga*, however, the court stepped back from this presumption and found that the child's need for continuity and stability was just one factor in determining whether to modify a custody award. The court found that other factors could also control the outcome of a custody case depending on the unique facts of each case. In adopting a best-interests analysis, the supreme court's decision in *LaMusga* adheres to the principle that, due to the fact-intensive nature of relocation cases, a comprehensive review of all possible factors impacting on a child's best interests will yield the most equitable results.
It is interesting to note that the California Family Code contains the same statutory language relied on by the Oklahoma Supreme Court in *Kaiser* to determine that the custodial parent had the presumptive right to determine where the child would reside. As the court in *Kaiser* noted, Cal. Fam. Code § 7501(a) is the mirror image of Okla. Stat. Ann. tit. 10, § 19. Despite the fact that California and Oklahoma both have the exact same statutory language, the respective supreme courts of the two states have fundamentally diverged on the effect of that language in relocation cases. Clearly, the California court has focused on the court's power to restrain the custodial parent's right to relocate depending on its effect on the child's welfare. The Oklahoma court, on the other hand, has evinced its preference for the custodial parent's right to control the residence of the child. The fact that two courts can interpret the exact same statutory language to assign two different burdens in relocation cases demonstrates the inherent difficulty in adjudicating these disputes.

The Georgia Supreme Court has also recently moved toward applying a best-interests standard in relocation cases. Until 2003, the Georgia courts utilized a presumption in favor of the custodial parent's decision to relocate with the child in his or her custody. *See, e.g., Ormandy v. Odom*, 217 Ga. App. 780, 459 S.E.2d 439 (1995) (custodial parent had prima facie right to retain custody after relocation unless noncustodial parent proved that the child would be endangered in the new environment). This presumption was abrogated by the Georgia Supreme Court in *Bodne v. Bodne*, 277 Ga. 445, 588 S.E.2d 728 (2003), in favor of a determination of whether the relocation would serve the best interests of the children involved.

Pursuant to a final judgment of divorce, the father in *Bodne* was awarded primary physical custody of the parties' children and the parties agreed to split equally the time each one would spend with the children. Two years later, the father planned to relocate from Georgia to Alabama and petitioned the court to modify the mother's visitation rights. The mother opposed the father's petition and also sought to be awarded primary physical custody of the children. While the trial court granted the wife's request, the Georgia Court of Appeals reversed. Relying on *Ormandy*, the court held that the father's proposed relocation did not constitute a change in circumstances warranting a modification of the original custody award.

The Supreme Court of Georgia reversed the court of appeals' decision and, in the process, expressly overruled the presumption implicit in *Ormandy* that "the custodial parent has a prima facie right to retain custody unless the objecting parent shows that the environment of the proposed relocation endangers a child's physical, mental or emotional well-being." 588 S.E.2d at 729.

The court noted that the motivation behind the father's relocation was his desire to improve his economic circumstances by establishing a new medical practice and "to leave behind the pre-divorce chapter of his life." *Id*. The court characterized the father's behavior as putting his interests above the mother's and the children's and found that his actions negatively affected both the children and the mother's ability to be involved in their lives. The court noted that the evidence presented at trial clearly demonstrated that "the children would suffer irreparable harm in being denied regular contact with their mother." *Id*. Based on this evidence, the court concluded that the trial court had correctly found that a material change in circumstances existed warranting the transfer of custody to the mother. The court held that such decisions must be governed by the best interests of the children involved, and not by any presumption or bright-line standard.

When exercising its discretion in relocation cases, as in all child custody cases, the trial court must consider the best interests of the
child and cannot apply a bright-line test. This means that an initial custodial award will not always control after any "new and material change in circumstances that affects the child" is considered. *Scott v. Scott*, 276 Ga. 372, 373, 578 S.E.2d 876 (2003). . . . [T]he primary consideration of the trial court in deciding custody matters must be directed to the best interests of the child involved, that all other rights are secondary, and that any determination of the best interests of the child must be made on a case-by-case basis. This analysis forbids the presumption that a relocating custodial parent will always lose custody and, conversely, forbids any presumption in favor of relocation.

*Id.*

The decisions in both *LaMusga* and *Bodne* are representative of the current trend toward relying on a best-interests standard in determining whether to allow a custodial parent to relocate. See also *In re Marriage of Ciesluk*, 2004 WL 1117900 (Colo. Ct. App. 2004) (holding that Colorado relocation statute as amended no longer contained presumption in favor of custodial parent); Fla. Stat. Ann. § 61.13 (2004) (abrogating any presumption in favor of or against any proposed relocation). But see *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003) (recently adopting presumption in favor of custodial parent). These jurisdictions have clearly rejected the concept that the custodial parent should possess a presumptive right to relocate absent a sufficient showing by the noncustodial parent that the proposed move is not in the child's best interests.


However, several jurisdictions also require that the custodial parent demonstrate a legitimate or good-faith motive for the proposed relocation in addition to showing that the move is in the child's best interests.

In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.


Finally, at least one jurisdiction has placed the burden on both parties, requiring both the custodial parent and the noncustodial parent to present evidence concerning whether the proposed relocation is or is not in the best interests of the child. Fla. Stat. Ann. § 61.13(2)(d) provides the following:

No presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact and access with the secondary residential parent.
C. Shifting Burden

A small number of jurisdictions have adopted what amounts to an intermediate standard between presumptively allowing the custodial parent to relocate and requiring the custodial parent to demonstrate that the proposed move is in the best interests of the child. These jurisdictions have adopted a shifting burden of proof, first placing the burden on the custodial parent to establish the existence of a good-faith or legitimate reason for the proposed relocation. If the custodial parent meets this burden, then the noncustodial parent must establish that the move would adversely affect the child's best interests.

This shifting burden of proof was employed by the Supreme Court of Connecticut in Ireland v. Ireland, 246 Conn. 413, 717 A.2d 676 (1998). Faced with the absence of any direct Connecticut statutory authority governing relocation requests, the court promulgated a shifting burden standard which the court concluded operated in furtherance of its "commitment to the best interests of the child standard." 717 A.2d at 680. The court noted that a custodial parent could have numerous legitimate reasons for relocating, such as obtaining new employment or remarriage, but could also have sinister motives designed to frustrate the relationship between the noncustodial parent and the child. Thus, the court placed the initial burden on the custodial parent to establish a legitimate reason for the move.

We conclude, therefore, that the custodial parent must bear the burden of proving, by a preponderance of the evidence, that the relocation is for a legitimate purpose and, further, that the proposed location is reasonable in light of that purpose.

Id. at 682.

The court then turned to the issue of the best interests of the child. The court acknowledged that many jurisdictions placed the burden on the custodial parent to show that a proposed relocation was in the child's best interests. The court concluded that the burden in these cases was misplaced for two reasons.

Our reasons are twofold. First, it should be presumed that when primary physical custody was entrusted to the custodial parent, the court making that determination considered that parent to be the proper parent to make the day-to-day decisions affecting the welfare of the child. In the absence of proof to the contrary, it should not be presumed that the custodial parent would choose to uproot himself or herself and the child and move to a distant location merely to frustrate the visitation schedule of the noncustodial parent. As with other important decisions regarding the child's welfare, the custodial parent should be permitted to choose the best place for the parent and the child to live. Placing the burden on the noncustodial parent is inconsistent with the trust shown by the court in awarding primary physical custody in the first instance to the custodial parent. Second, as the party claiming that relocation would not be in the child's best interests, it should be incumbent upon the noncustodial parent to demonstrate the reasons supporting that assertion. The noncustodial parent is the party most likely to have access to information such as distance, time or financial restraints that could impact his or her potential postrelocation visitation schedule. Additionally, the noncustodial parent is in the best position to prove that any change in the quantity or nature of contact between that parent and the child as a result of the move would be so detrimental to the best interests of the child that the relocation itself would not be in the child's best interests.
Id. at 682-83; cf. Bretherton v. Bretherton, 72 Conn. App. 528, 805 A.2d 766, 772 (2002) ("Therefore, the failure of the custodial parent to meet his or her initial burden cannot in and of itself end the matter in relocation cases. To predicate a decision whether to permit relocation on the basis of parental conduct only, even when that conduct appears unreasonable or illegitimate, would be to ignore the needs of the child and to reduce the court's inquiry to assessing the parents' action only.").

This shifting burden of proof between the custodial parent and the noncustodial parent has also been adopted by statute in New Hampshire, the relevant portion of which reads as follows:

IV. The custodial parent seeking permission to relocate bears the initial burden of demonstrating, by a preponderance of the evidence, that:

(a) The relocation is for a legitimate purpose; and

(b) The proposed location is reasonable in light of that purpose.

V. If the burden of proof established in paragraph IV is met, the burden shifts to the non-custodial parent to prove, by a preponderance of the evidence, that the proposed relocation is not in the best interest of the child.


III. Provisions Against Relocation in Order

Often, the initial custody award will contain some provision addressing a custodial parent's right to relocate with a child. Generally, these provisions place some kind of geographic restriction on where the custodial parent may live with the child and often provide for an automatic change of custody to the noncustodial parent if this restriction is violated. Sometimes, however, these provisions operate to preserve a custodial parent's right to move, often setting forth which locations are acceptable.

The effect of these provisions varies wildly from state to state. Many courts have expressed disdain for these provisions as they amount to improper speculation concerning the possibility of future changed circumstances. This was the conclusion reached by the Georgia Supreme Court in Scott v. Scott, 276 Ga. 372, 578 S.E.2d 876 (2003).

Pursuant to a final decree of divorce, the parties were granted joint custody of their child, with the mother being awarded primary physical custody. The final decree also provided that if the wife ever relocated outside of Cobb County, Georgia, this move would be considered a material change in circumstances and custody of the child would automatically revert to the father. Although the mother was not planning on relocating, she still appealed the divorce judgment, arguing that the self-executing change-of-custody provision was invalid.

The Georgia Supreme Court agreed with the wife and reversed the trial court's decision. The court noted the existence of several earlier decisions in which a self-executing change-of-custody provision was upheld based on a party's relocation or remarriage. The court found, however, that these earlier decisions affirming self-executing provisions in the case of relocation or remarriage necessarily conflicted with Georgia law.

The court found that such a provision was contrary to the settled law that relocation or remarriage does not constitute a change of
circumstances warranting a transfer of custody without more. Furthermore, the court found that the effect of such a provision was fatally inflexible and that such provisions "altogether ignore the best interests of the child at the time of the triggering event." 578 S.E.2d at 879. The court concluded that while self-executing change-of-custody provisions were not per se unlawful in Georgia, such a provision would violate public policy and, therefore, be unenforceable if it "fails to give paramount import to the child's best interests." Id.

Numerous other courts have likewise concluded that such provisions barring relocation are not enforceable. See, e.g., Godwin v. Balderamos, 876 So. 2d 1169 (Ala. Civ. App. 2003) (agreement to keep child in a particular geographic location only dispositive of child's best interests as long as the parties' circumstances have not changed; agreement has no effect if it is no longer in the child's best interests); In re Marriage of Seitzinger, 333 III. App. 3d 103, 775 N.E.2d 282 (2002) (provision that custody of child would change automatically upon relocation of parent did not take into account best interests of child at the time of the change); Zeller v. Zeller, 640 N.W.2d 53 (N.D. 2002) (provision in parties' agreement incorporated into final divorce decree that father would automatically receive custody if mother transferred from North Dakota was unenforceable and attempted to usurp court's authority to determine best interests of the child).

Other jurisdictions, however, have found that these provisions are valid and enforceable. For example, in Pointer v. Bell, 719 So. 2d 222 (Ala. Civ. App. 1998), the parties' separation agreement that was incorporated into the final divorce decree contained a provision which required the mother, who had custody of the parties' children, to reside within a 165-mile radius of Fort Payne, Alabama. The mother subsequently sought the court's permission to be allowed to move with her new husband to Las Vegas, far outside of the 165-mile territorial restriction. The trial court rejected the wife's request and enforced the territorial restriction contained in the parties' agreement.

The Court of Civil Appeals of Alabama affirmed the trial court's decision. The court noted that such restrictions could be upheld if they were in the best interests of the child. Id. at 223. The court also noted, however, that such restrictions may be subject to change if they no longer serve the child's best interests. Id. at 223-24. The trial court had found that the mother's evidence supporting her relocation request demonstrated that the possibility for an enhanced standard of living was tentative at best and that the move would negatively affect the father's relationship with the child. The court concluded that the trial court did not abuse its discretion in determining that the territorial restriction still served the best interests of the child based on the evidence presented at trial.

While the court in Pointer enforced the territorial restriction provision, the court's decision was guided by the fact that it found that the restriction still served the best interests of the child. Thus, although the court reached the opposite result from that of the court in Scott, both courts clearly look to the best interests of the child to determine whether a territorial restriction provision should be enforced.

For other cases enforcing provisions in initial custody orders imposing territorial restrictions see, e.g., Leeds v. Adamse, 832 So. 2d 125 (Fla. 4th Dist. Ct. App. 2002) (court had authority to include clause in final judgment requiring the mother to remain in the city of the children's primary residence); LaChappelle v. Mitten, 607 N.W.2d 151, 163 (Minn. Ct. App.), cert. denied, Mitten v. LaChapelle, 531 U.S. 1011 (2000) (court could require mother to return to Minnesota as a condition of award of sole physical custody); and Tomasko v. DuBuc, 145 N.H. 169, 761 A.2d 407 (2000) (stipulation incorporated into final divorce decree which provided that mother would remain in New Hampshire acted as waiver of her constitutional
Occasionally, the parties' agreement or final order may contemplate the future relocation of the custodial parent. In general, such a provision, much like geographic restrictions, will not be enforced unless found to be in the child's best interests. For example, in Savage v. Morrison, 262 A.D.2d 1077, 691 N.Y.S.2d 842 (1999), the parties entered into a separation agreement which provided that the mother, as the custodial parent, had the right to relocate with the child. Based on this provision, the mother argued that she was allowed to relocate to Pittsburgh with the parties' child. Despite the express language of this provision, the New York Supreme Court, Appellate Division, Fourth Department, concluded that "[w]hile that provision in the agreement is a relevant factor to consider in determining the child's best interests, it is not dispositive." 691 N.Y.S.2d at 843. Based on its finding that the mother would not be supportive of the father's continued relationship with the child if the relocation was allowed, the court held that the proposed relocation was not in the child's best interests.

Furthermore, some states have enacted statutes which recognize the presumptive validity of territorial restriction provisions when contained in an agreement between the parents or in a valid parenting plan. Representative of these statutes is Ariz. Rev. Stat. Ann. § 25-408 which reads as follows:

The court shall not deviate from a provision of any parenting plan or other written agreement by which the parents specifically have agreed to allow or prohibit relocation of the child unless the court finds that the provision is no longer in the child's best interests. There is a rebuttable presumption that a provision from any parenting plan or other written agreement is in the child's best interests.

A representative decision involving a truly shared custody arrangement is O'Connor v. O'Connor, 349 N.J. Super. 381, 793 A.2d 810 (App. Div. 2002). In O'Connor, the parties executed a separation agreement in which they agreed that they would have joint custody of their child. The parties agreed that the mother would serve as the child's residential custodian, with the husband receiving liberal parenting time. The parties' agreement was subsequently incorporated into a final decree of divorce. After the divorce, the father played an active role in the child's life, picking him up from school several days a week and keeping the child in his custody until the evening and sometimes overnight. The mother was also required to travel for her employment, and during her trips the father would have custody of the child.

The mother began dating a man who lived in Indiana and she planned to remarry and move to
that state. The mother's employer agreed to allow the mother to work out of its Indiana office. The father petitioned for a restraining order to prevent the mother's relocation. The trial court ultimately concluded that the parties had shared custody of the child and ordered that the father would be the residential custodian. In reaching this decision, the trial court found that the parties' shared parenting arrangement did not require the court to apply the normal standard for resolving relocation disputes.

The Superior Court of New Jersey, Appellate Division, affirmed the trial court's decision, holding that a petition to relocate in the context of a truly shared custody arrangement must be treated, instead, as a petition to modify custody.

793 A.2d at 821-22. The court stated that this concern with the nature of the parties' custodial arrangement was not dependent on the terms used by the parties to describe their arrangement as the terms of their agreement and the divorce judgment indicated that the parties only had joint legal custody. The court held that the applicable question was "whether these parties truly share both legal and physical custody." Id. at 822. In order to determine if such a shared custody arrangement existed, the court stated that the critical factor in making such a determination is the division of time regarding "each party's responsibility for the custodial functions, responsibilities and duties" normally performed by the child's primary caretaker. Id. at 823.

Turning to the facts of the case, the court noted that the trial court made detailed findings that established that the parties shared "primary custodial responsibilities" including (1) transporting the child to and from school; (2) attending the child's school activities and sporting events; (3) helping the child with homework; (4) preparing the child's meals; (5) caring for the child overnight; and (6) attending to the child's medical needs. Id. at 824. The court concluded that the trial court's findings that the parties truly shared custody of the child were supported by the record, and, therefore, the trial court was correct in not applying the traditional relocation analysis to the parties' unique custody arrangement.

For other cases holding that proposed relocation requests which would result in the effective termination of a shared physical custodial arrangement should be treated as a modification of custody, see, e.g., Lewellyn v. Lewellyn, 351 Ark. 346, 93 S.W.3d 681 (2002) (both mother and father petitioned for sole custody of children after mother's proposed relocation would make parties' shared physical custodial arrangement unworkable; court found that mother's relocation constituted material change of circumstances warranting award of sole custody to father, even though such a relocation would not be considered a material change in circumstances in a case that did not involve shared physical custody), and In re Marriage of Garst, 955 P.2d 1056 (Colo. Ct. App. 1998) (cases in which parties share physical custody are indistinguishable from initial custody awards; thus, best interests of child would control any request for relocation by parent). See also Tenn. Code Ann. § 36-6-108 (2004) (where parents are spending substantially equal amounts of time with child, no presumption in favor of either parent arises when one parent seeks to relocate).
V. In-State Moves

Relocation disputes may also arise when the custodial parent seeks to move with the child to another location within the same state. Generally, such intrastate moves are allowed regardless of the differing relocation standards applied by the states. The reason for this is that most intrastate relocations typically do not involve the same amount of geographical distance between the parents as most interstate moves.

For example, the Superior Court of Pennsylvania allowed the custodial parent to relocate to another county within Pennsylvania in Bednarek v. Velazquez, 830 A.2d 1267 (Pa. Super. Ct. 2003). The father opposed the mother's proposed move to another county 73 miles away with the parties' children. The relocation was so the mother could attend college. Furthermore, she had already secured housing as well as employment at the school. Applying the relevant standard for interstate moves, the trial court found that the mother's relocation was in the best interests of the children.

Recognizing that the case presented a different situation from one involving an interstate move, the Superior Court of Pennsylvania concluded that the trial court had the discretion whether or not to use the interstate relocation standard in intrastate cases. The court noted that the geographical distance involved in an intrastate move could vary wildly from case to case. The court concluded that the primary basis for applying the interstate standard was the size of this geographic distance and its effect on the noncustodial parent's relationship with the children.

Giving the trial courts the discretion to apply Gruber in intra-state relocations will appropriately focus the best interest analysis where geographical distance is truly an issue and will not "burden our family courts with the necessity of prior approval of any relocation absent a showing by the non-custodial parent that such a move will negatively affect the parent child relationship." Id. at 1271. The court found that the trial court did not abuse its discretion in permitting the mother's relocation. See, e.g., Van Asten v. Costa, 874 So. 2d 1244 (Fla. 4th Dist. Ct. App. 2004) (mother's request to relocate within the state was denied where proposed substitute visitation would be inadequate for father and child to maintain their relationship); In re Marriage of Seitzinger, 333 Ill. App. 3d 103, 775 N.E.2d 282, 288 (2002) ("It is not necessary for a custodial parent or a parent with primary physical custody to obtain permission from a court before moving to another location in Illinois."); Watt v. Watt, 971 P.2d 608 (Wyo. 1999) (custodial parent's intrastate move could not be considered a material change in circumstances warranting change of custody); Schulze v. Morris, 361 N.J. Super. 419, 825 A.2d 1173 (App. Div. 2003) (intrastate moves judged by same standard as interstate moves).

Some states have enacted statutes which allow a custodial parent to relocate within a state without having to seek permission from the court as long as the proposed move is less than a fixed distance as provided in the statute. For instance, Mich. Comp. Laws Ann. § 722.31 provides that a custodial parent cannot move more than 100 miles away from the child's legal residence without seeking the court's permission. The distance limitation in other states varies from 60 miles to 150 miles. In these states, a custodial parent is given some freedom to relocate within the state without involving the court. See, e.g., Ariz. Rev. Stat. Ann. § 25-408 (2004) (no notice if no more than 100 miles intrastate); Or.
VI. Noncustodial Parent's Petition to Modify Custody

A. Changed Circumstances Standard

In addition to attempting to prevent relocation, the noncustodial parent often petitions to transfer custody when the custodial parent seeks permission to move. As the noncustodial parent is seeking to modify the relevant custody award, his or her petition is treated in the same manner as any other request for modification, as opposed to the standards discussed above typically applied in relocation cases.

The majority of states require that a parent seeking to modify a custody award establish that there has been a material change in circumstances since the custody order was entered or last modified. Jeff Atkinson, Modern Child Custody Practice § 10-5 (2d ed. 2004). Moreover, even if a change in circumstances exists, modification will only be allowed if it is in the best interests of the child. Id.

There is a decided split among jurisdictions concerning whether the custodial parent's relocation automatically constitutes a material change in circumstances. Many jurisdictions have held that the relocation of the custodial parent does not necessarily constitute a change in circumstances. This was the position espoused by the South Carolina Supreme Court in Latimer v. Farmer, 2004 WL 1822753 (S.C. 2004). The father, who was awarded sole custody of the parties' child, obtained a new job in Michigan and moved there with the child and his new wife. The mother petitioned to block the father's out-of-state relocation and also sought a transfer of custody of the parties' child.

We decline to hold relocation in itself is a substantial change in circumstance affecting the welfare of a child. Relocation is one factor in considering a change in circumstances, but is not alone a sufficient change in circumstances. One location may not necessarily affect the best interests of the child as would another. The effect of relocation on the child's best interest is highly fact specific. It should not be assumed that merely relocating and potentially burdening the non-custodial parent's visitation rights always negatively affects the child's best interests.

Id. at *3. Although not necessary after finding no change in circumstances, the court also concluded that the wife failed to show that transferring custody to the mother was in the best interests of the child. The court found noticeable benefits for the child from the father's move and that the child's best interests would be served by allowing the move.

For other cases holding that the relocation of a custodial parent does not necessarily constitute a material change in circumstances, see Hollandsworth v. Knyzewski, 353 Ark. 470, 109 S.W.3d 653, 657 (2003) ("[R]elocation of a primary custodian and his or her children alone is not a material change in circumstance."); Botterbusch v. Botterbusch, 851 So. 2d 903, 905 (Fla. 4th Dist. Ct. App. 2003) (same); and Evans v. Evans, 138 N.C.
The court's decision in *Latimer* also makes clear that even if a proposed relocation is considered a material change in circumstances, a noncustodial parent still must establish that a transfer of custody is in the child's best interests. Thus, the father's petition to transfer custody in *In re Marriage of Colson*, 183 Or. App. 12, 51 P.3d 607 (2002), was properly denied where the court held that he failed to establish that the award of custody was in the child's best interests even though the mother's out-of-state relocation could be considered to be a change in circumstances. The court emphasized that the child's need for stability demonstrated that it was in the child's best interests to remain in the mother's custody.

Other states have reached the opposite conclusion and have held that the relocation of the custodial parent always constitutes a material change in circumstances. As a result, these jurisdictions immediately proceed to determining whether the transfer of custody is in the child's best interests, as the requisite material change in circumstances is already established by operation of law. Often, these states have enacted statutes setting forth this rule. A typical example of these types of statutes is Iowa Code Ann. § 598.21, which reads as follows:

> If a parent awarded joint legal custody and physical care or sole legal custody is relocating the residence of the minor child to a location which is one hundred fifty miles or more from the residence of the minor child at the time that custody was awarded, the court may consider the relocation a substantial change in circumstances.


Regardless of whether this rule has been adopted by the courts or by statute, parties seeking a transfer of custody are still not excused from showing that the requested transfer is in the best interests of the child. In *Weaver v. Kelling*, 53 S.W.3d 610 (Mo. Ct. App. 2001), the mother's out-of-state relocation served as a material change in circumstances. However, the court found that the father failed to prove that transferring custody of the parties' children to him was in their best interests and, therefore, denied his petition.

### B. Endangerment Standard

A handful of states follow what is known as the "endangerment standard" in determining whether to modify child custody. *Atkinson, supra*, § 10-4. This standard is used in jurisdictions that have adopted the Uniform Marriage and Divorce Act. Some states require only a showing that "[t]he child's present environment may endanger seriously his physical, mental, moral, or emotional health" before custody may be modified under the endangerment standard. *Ky. Rev. Stat. Ann. § 403.340(2)(a) (2004)*. Other states require this showing of harm in addition to proving both the existence of a material change in circumstances and that any modification is in the child's best interests. *Colo. Rev. Stat. Ann. § 14-10-131 (2004)*. Thus, under the endangerment standard, a custodial parent's decision to relocate will not result in a transfer of custody unless the noncustodial parent can show that the harm caused by the child's new environment is outweighed by the advantage to the child in modifying custody. See *Fenwick v. Fenwick*, 114 S.W.3d 767 (Ky. 2003) (endangerment standard applied in relocation cases; fact that relocation would affect frequency of
father's contact with children did not demonstrate that relocation would result in serious harm to the children); *In re Marriage of Steving & Brown*, 980 P.2d 540 (Colo. Ct. App. 1999) (applying endangerment standard, court rejected father's petition for custody in light of mother's relocation).

VII. Relocation as Factor in Initial Custody Awards

In divorce or dissolution cases, a party's proposed relocation may also be considered a factor in determining the initial custody award. Generally, the fact that one party plans on leaving or has already left the state does not control the outcome of an initial custody award, but is only one of many factors used by a court in fashioning a custody award that is in the best interests of the child and does not serve to create a presumption in favor of awarding custody to the non-relocating parent.

In *Barney v. Barney*, 301 A.D.2d 950, 754 N.Y.S.2d 108 (2003), the New York Supreme Court, Appellate Division, Third Department, awarded primary physical custody of the parties' child to the mother despite the fact that the mother had moved to Vermont with the child after the parties separated. The court held that the effect of the mother's relocation must be a factor in awarding custody. "Where, as here, one parent moves prior to a custody determination, the effect of the move is certainly a factor in the best interests analysis." 754 N.Y.S.2d at 110. The court found that the evidence presented at trial supported a finding that it was in the child's best interests to award the mother custody. The child was more closely bonded to the mother than the father and the child had enjoyed educational and social advantages in her new home.

Similarly, in *Ford v. Ford*, 68 Conn. App. 173, 789 A.2d 1104, certif. denied, 260 Conn. 910, 796 A.2d 556 (2002), the Appellate Court of Connecticut affirmed the decision that it was in the best interests of the child to award the mother custody and to allow her to relocate to Massachusetts. The court noted that the applicable standard in post-divorce relocation cases does not apply to initial custody determinations. "[R]elocation issues that arise at the initial judgment for the dissolution of marriage continue to be governed by the standard of the best interest of the child as set forth in § 46b-56." 789 A.2d at 1111.

A parent's decision to relocate is generally only one of numerous factors used to determine the child's best interests. However, in cases where the parents are both equally fit custodians, one parent's decision to relocate may become the deciding factor in an initial custody award. Such an outcome occurred in *Davis v. Davis*, 356 S.C. 132, 588 S.E.2d 102 (2003), where the South Carolina Supreme Court found it was in the child's best interests that the father be awarded custody in light of the mother's stated intention to relocate from Aiken, South Carolina, to another city in South Carolina. Both parties were found to be fit custodians and the issue of who should be awarded custodian "was an extremely close question." 588 S.E.2d at 103. The court concluded that the mother's decision to move could be considered a factor in determining the initial custody award. The court also held that while generally the mother's decision to relocate would only be one of many factors in determining the best interests of the child, "[i]n cases where custody is a close question, as here, it may become the deciding factor." *Id.* at 104. The court found that where it was in the child's best interests to remain in Aiken, custody should be awarded to the father.

VIII. Factors

Most jurisdictions have promulgated lengthy lists of factors to be utilized in determining whether a custodial parent's proposed relocation should be
permitted. In general, there is a substantial overlap among the jurisdictions, with many states using substantially similar factor lists. The New Jersey Supreme Court has fashioned a typical example of one of these lists.

With those principles in mind, in assessing whether to order removal, the court should look to the following factors relevant to the plaintiff's burden of proving good faith and that the move will not be inimical to the child's interest: (1) the reasons given for the move; (2) the reasons given for the opposition; (3) the past history of dealings between the parties insofar as it bears on the reasons advanced by both parties for supporting and opposing the move; (4) whether the child will receive educational, health and leisure opportunities at least equal to what is available here; (5) any special needs or talents of the child that require accommodation and whether such accommodation or its equivalent is available in the new location; (6) whether a visitation and communication schedule can be developed that will allow the noncustodial parent to maintain a full and continuous relationship with the child; (7) the likelihood that the custodial parent will continue to foster the child's relationship with the noncustodial parent if the move is allowed; (8) the effect of the move on extended family relationships here and in the new location; (9) if the child is of age, his or her preference; (10) whether the child is entering his or her senior year in high school at which point he or she should generally not be moved until graduation without his or her consent; (11) whether the noncustodial parent has the ability to relocate; (12) any other factor bearing on the child's interest.


Other jurisdictions have set forth the required factors to be considered in relocation cases by statute. One of the most comprehensive factor lists can be found at La. Rev. Stat. Ann. § 9:355.12 (2004).

A. In reaching its decision regarding a proposed relocation, the court shall consider the following factors:

1. The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate and with the nonrelocating parent, siblings, and other significant persons in the child's life.

2. The age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.

3. The feasibility of preserving a good relationship between the nonrelocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties.

4. The child's preference, taking into consideration the age and maturity of the child.

5. Whether there is an established
pattern of conduct of the parent seeking the relocation, either to promote or thwart the relationship of the child and the nonrelocating party.

(6) Whether the relocation of the child will enhance the general quality of life for both the custodial parent seeking the relocation and the child, including but not limited to financial or emotional benefit or educational opportunity.

(7) The reasons of each parent for seeking or opposing the relocation.

(8) The current employment and economic circumstances of each parent and whether or not the proposed relocation is necessary to improve the circumstances of the parent seeking relocation of the child.

(9) The extent to which the objecting parent has fulfilled his or her financial obligations to the parent seeking relocation, including child support, spousal support, and community property obligations.

(10) The feasibility of a relocation by the objecting parent.

(11) Any history of substance abuse or violence by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.

(12) Any other factors affecting the best interest of the child.

B. The court may not consider whether or not the person seeking relocation of the child will relocate without the child if relocation is denied or whether or not the person opposing relocation will also relocate if relocation is allowed.

For other statutes containing relocation factors, see, e.g., Mich. Comp. Laws Ann. § 722.31 (2004); Tenn. Code Ann. § 36-6-108 (2004); Utah Code Ann. § 30-3-37 (2004); and Wash. Rev. Code Ann. § 26.09.520 (2004). Other factors that have also been utilized in relocation disputes include (1) whether the reasons given either for or against the proposed move were designed to gain a financial advantage regarding a continuing child support obligation, Ariz. Rev. Stat. Ann. § 25-408 (2004), (2) whether there are advantages to the child's remaining with the primary caregiver, Colo. Rev. Stat. Ann. § 14-10-129 (2004), (3) whether the cost of travel is affordable by the parties, Fla. Stat. Ann. § 61.13 (2004), and (4) whether the proposed relocation is to a foreign country which does not normally enforce the rights of noncustodial parents. Ala. Code § 30-3-169.3 (2004).

The sheer number of factors that must be considered in relocation cases demonstrates the fact-specific nature of all such determinations. However, despite the sometimes overly long lists of factors devised by the courts or the legislatures, in general these factors can be condensed into four primary categories: (1) each parent's motives for seeking or opposing relocation, (2) the potential of the relocation to enhance the quality of life of the child and the custodial parent, (3) the impact of the relocation on the noncustodial parent's relationship with the child, and (4) if relocation is permitted, whether a visitation schedule can be devised that will provide the noncustodial parent a realistic opportunity to maintain a relationship with the child and the likelihood that the custodial parent will comply with this schedule.

IX. Custodial Parent's Reasons for Relocation
Possibly the most important of the relocation factors is the custodial parent's reason(s) for the proposed relocation. As discussed in Part II(B), several jurisdictions require the prima facie showing of a legitimate or good-faith reason for the proposed relocation before the best interests of the child will be considered. Even jurisdictions that do not require such a showing generally consider the motives of the parents underlying the relocation as factors in determining the best interests of the child. While it would be impossible to catalog all possible reasons, there are several that arise with great frequency in relocation cases. A representative list of what constitutes a legitimate or good-faith reason for relocation is set forth in *Dupre v. Dupre*, 2004 WL 1698336 (R.I. 2004).

"(1) to be close to significant family or other sources of support, (2) to address significant health problems, (3) to protect the safety of the child or another member of the child's household from a significant risk of harm, (4) to pursue a significant employment or educational opportunity, (5) to be with one's spouse or domestic partner who lives in, or is pursuing a significant employment or educational opportunity in, the new location, (6) to significantly improve the family's quality of life. The relocating parent should have the burden of proving the validity of any other purpose." Section 2.17(4)(a)(ii).


These reasons can be divided into two categories—economic and personal. Legitimate economic reasons arise when a proposed relocation conveys a financial benefit on, or causes the economic improvement of, the custodial parent and include employment and educational opportunities as well as the opportunities of the custodial parent's new spouse. Legitimate personal reasons, on the other hand, convey no direct financial benefit but, instead, increase the custodial parent's quality of life or emotional well-being. These benefits include the advantages of relocating near family and moves designed to facilitate remarriage. Generally, courts are more swayed by economic reasons, finding that improvements in the custodial parent's economic circumstances tend to more directly accrue to the child than any increase in the custodial parent's well-being for personal reasons.

**A. Economic Reasons**

**1. Employment Opportunities**

Frequently, a custodial parent will seek to relocate with the child after securing a new job or being transferred to a new geographic area by his or her employer. Courts often find that the prospect of increased economic advantages for the custodial parent as a result of these employment opportunities is enough to support a request for relocation.

The mother was allowed to relocate in *In re S.E.P.*, 35 S.W.3d 862 (Mo. Ct. App. 2001), after being transferred by her employer. The mother received a promotion which required her to relocate to Florida. The mother was also informed by her employer that no such job opportunity would be available in her geographic area any time in the near future. Furthermore, after learning of the mother's promotion, her new husband also obtained a new job in Florida. The Missouri Court of Appeals granted the wife's request to relocate, finding that the move would be in the children's best interests as they would benefit from the increased economic opportunities that the mother would enjoy in Florida.

In *Dickson v. Dickson*, 634 N.W.2d 76 (N.D. 2001), the mother was unable to obtain a teaching position in the counties surrounding her home in North Dakota. She found a teaching job in
California at a higher salary than she would have received in North Dakota and made plans to relocate there. The North Dakota Supreme Court found that the mother was not required to exhaust all possible job opportunities in North Dakota before looking out of state. The court found that the economic advantages provided by the mother's job, as well as various noneconomic factors, including the presence of the mother's family in California, were sufficient to allow relocation.

Not every employment opportunity will be considered sufficient to allow relocation. In Tremain v. Tremain, 264 Neb. 328, 646 N.W.2d 661 (2002), the father petitioned to relocate to Oregon. The father had obtained a teaching position there that paid substantially more than he had been earning in Nebraska. The Nebraska Supreme Court found that the father's job opportunity constituted a legitimate reason supporting his relocation request; however, the court found that this reason alone was not sufficient to permit relocation. "The only factor which weighs in Charles' favor is the possibility of enhanced income, and this factor is not sufficient to carry the burden to establish that it is in the children's best interests to be moved to Oregon." 646 N.W.2d at 666. The court denied the father's relocation request, finding that it was not in the best interests of the children.

For other cases involving relocation requests premised on employment opportunities, see, e.g., Hass v. Hass, 74 Ark. App. 49, 44 S.W.3d 773 (2001) (custodial parent allowed to relocate after graduating from law school to pursue clerkship with federal judge); Botterbusch v. Botterbusch, 851 So. 2d 903, 905 (Fla. 4th Dist. Ct. App. 2003) (mother allowed to relocate intrastate where, in part, she would earn more income and work fewer hours at new job); Fohey v. Knickerbocker, 130 S.W.3d 730 (Mo. Ct. App. 2004) (custodial parent did not meet burden of proof to establish that relocation was in child's best interests; even though mother obtained new, higher-paying job, she offered no evidence of how her increased salary would benefit child); and Miller v. Pipia, 297 A.D.2d 362, 746 N.Y.S.2d 729 (2002) (mother allowed to relocate to Florida in stipulation where she was not able to secure employment that would allow her to rent an apartment in New York as well as afford child care).

2. Educational Opportunities

Another reason which is often found sufficient to permit relocation is the custodial parent's pursuit of educational or training opportunities with an eye toward improving the parent's earning potential, job opportunities, or chance for advancement. In Geiger v. Yaeger, 846 A.2d 691 (Pa. Super. Ct. 2004), the mother was allowed to relocate to North Carolina where the move offered her increased educational opportunities. The mother was a nurse in Pennsylvania but had no more opportunity for advancement without further education. The mother obtained a similar nursing job in North Carolina. While the pay was slightly less, the hospital offered tuition reimbursement as a benefit which was needed by the mother to fund her further education. The Pennsylvania Superior Court found that the mother's motive for the proposed relocation was to further her education and that such a move was in the child's best interests.

These facts definitely show that mother's life will be improved by the move to North Carolina. Mother's happiness and well-being will in turn better both the economic and non-economic interests of Breanna: economically since mother's increase in her education will translate into increased job opportunities and increased family income; non-economically because mother's ability to go to school again will show Breanna by demonstration that school is very important...
and worthwhile and because mother's increased welfare will make life happier for Breanna.

Id. at 698; see also Bednarek v. Velazquez, 830 A.2d 1267 (Pa. Super. Ct. 2003) (mother's intrastate relocation to attend college allowed).

However, if the educational opportunity pursued by the custodial parent is available in other geographic areas, particularly those surrounding his or her current residence, courts are much more reluctant to find the pursuit of these opportunities an adequate basis to allow relocation. For example in Flynn v. Flynn, __ Nev. ___, 92 P.3d 1224 (2004), the wife desired to move to California in order to enroll in a two-year associate's degree program in Theology. The Nevada Supreme Court rejected the wife's contention that she presented a good-faith reason supporting her proposed relocation. The court found that the mother was only pursuing this degree for her own interest and did not expect it to increase her income. The court also found that the mother could obtain the same degree from the same college without relocating via Internet classes or classes held at the college's extension campus. Because there was no need for the mother to relocate to obtain her degree and the proposed move would negatively impact the father's relationship with the child, the court denied the mother's request to relocate.

3. Remarriage

Economic reasons relating to the remarriage of the custodial parent will also frequently justify a request to relocate. This situation typically occurs when a custodial parent's new spouse obtains a better job out of state. In Tibor v. Tibor, 598 N.W.2d 480 (N.D. 1999), the mother's new husband was offered a job in Georgia after he had lost his job and had no prospects of employment in North Dakota. The Supreme Court of North Dakota found that the financial advantages attendant to the new husband's job in Georgia necessarily accrued to the mother's children and should be considered in determining whether it was in the children's best interests to permit relocation.

There is also a direct relationship between a stepparent's financial situation and the circumstances of a spouse's dependent children, because a stepparent is liable to support a spouse's dependent children if he receives them into the family and for as long as they remain in the stepparent's family. A stepparent naturally takes on a family relationship with children of a spouse and becomes part of the integrated family unit. When a stepparent's career takes him or her out of state to secure a job, allowing the spouse and the spouse's children to also relocate to that place is crucially important to maintaining family continuity and stability.

Id. at 485. The court concluded that it was in the children's best interests to allow the mother to relocate and that the father's relationship with the children could be adequately preserved via a revised visitation schedule. See also McLaughlin v. McLaughlin, 264 Neb. 232, 647 N.W.2d 577 (2002) (mother's new husband's acceptance of out-of-state job with potential for advancement was a legitimate reason for mother's proposed relocation even though husband had been offered employment in state that was not in his field; mother satisfied burden that it was in the children's best interests to allow relocation).

However, a custodial spouse's remarriage will not always serve as a basis to allow relocation. For example, in Sullivan v. Knick, 38 Va. App. 773, 568 S.E.2d 430 (2002), the mother sought permission to relocate to South Carolina with her new husband, who had obtained employment in that state. Evidence demonstrated that the new husband had ample employment opportunities in Virginia; however, he pursued employment in South Carolina
in order to be closer to his child by a prior marriage. The father had been a committed parent even though he lacked custody, and expert testimony was presented that established that the reduction in his parenting time with the child would have an adverse effect on their relationship. The court concluded that the mother's proposed relocation only reflected the interests of herself and her new husband and not those of the child. Holding that the few benefits that might accrue to the child were outweighed by the detrimental effect on the child's relationship with the father, the court denied the mother's request to relocate.

B. Personal Reasons

1. Remarriage

While the employment or educational opportunities of a custodial parent's new spouse may constitute legitimate economic reasons for a proposed relocation, the actual remarriage of the custodial parent and the decision to move to be with the new spouse are purely personal. However, a custodial parent's remarriage has been held to be a sufficient reason to permit relocation, especially if it is established that the parent's standard of living would increase as a result of the remarriage or that the parent's gratification or the increased stability of the new relationship would serve the best interests of the child.

For instance, in *In re Marriage of Collingbourne*, 204 Ill. 2d 498, 791 N.E.2d 532 (2003), the mother petitioned to be allowed to relocate to Massachusetts where her fiancé lived. By doing so, the mother would be able to work in her fiancé's business, earning more income but working fewer hours so she would have more time to spend with the child. The mother and child would also live in the fiancé's house as opposed to the apartment they rented in Illinois. The court relied on the increased lifestyle that both the child and mother would enjoy if relocation were allowed as a factor in determining that allowing the move was in the child's best interests. See also *Rosenthal v. Maney*, 51 Mass. App. Ct. 257, 745 N.E.2d 350 (2001) (mother allowed to relocate to Rhode Island in order to be with new husband who lived and worked in that state; mother's financial situation improved as a result of her marriage, allowing her to work less and spend more time with child); *Caudill v. Foley*, 21 S.W.3d 203 (Tenn. Ct. App. 1999) (mother's marriage to a man who owned his own business and lived in Florida constituted reasonable purpose for relocation).

The potential for happiness that the custodial parent derives from a new spouse is not, however, always sufficient to allow relocation. See also *In re Marriage of Sale*, 347 Ill. App. 3d 1083, 808 N.E.2d 1125, 1129 (2004) (“[A] custodial parent must prove more than his or her own desire to live with a new spouse to show that a child's best interests will be served by a removal.”); *Yelverton v. Stokes*, 247 A.D.2d 719, 669 N.Y.S.2d 80, leave to appeal denied, 92 N.Y.2d 802, 699 N.E.2d 433, 677 N.Y.S.2d 73 (1998) (mother's request to move to California where her new husband lived and worked denied where move would essentially deprive father of contact with child, child was unfamiliar with California, and the new husband had at best a developing relationship with child).

2. Extended Family

Another personal reason that is often found to be sufficient to permit a custodial parent to relocate with the child is the desire to move closer to the custodial parent's family. Courts frequently hold that the support and stability that can be offered by a parent's extended family will serve the child's best interests. For example, in *Reel v. Harrison*, 118 Nev. 881, 60 P.3d 480 (2002), the mother sought permission to relocate to New Jersey, in part because she would be close to her extended family. The mother had no relatives in Nevada. The Nevada Supreme Court found that this constituted
a sufficient reason to allow the mother to relocate. See also Aziz v. Aziz, 8 A.D.3d 596, 779 N.Y.S.2d 539 (2004) (mother's request to relocate granted where mother had large extended family and support network in other state and child had bonded with mother's family).

A proposed relocation to allow a custodial parent to move closer to his or her extended family may not be a sufficient reason, however, if there is no demonstrable benefit to the child from the move. In Miller v. Miller, 799 So. 2d 753 (La. Ct. App. 3d Cir. 2001), the mother sought to move to Maryland with the parties' children. The primary reason for the proposed relocation was to be closer to her family, who could assist her in caring for the children and, thus, enable her to obtain a nursing degree. The Louisiana Court of Appeals denied the mother's request, stating that her reasons for relocating were "more for her interest than for the children." Id. at 757. The court noted that the children had lived their entire lives in Louisiana and had had little contact with the mother's side of the family.

X. Conclusion

If this article makes one thing clear, it is that there is no easy way to summarize the state of the law concerning the relocation of the custodial parent. States employ a myriad of different standards to govern relocation disputes, which range from giving the relocating parent the presumptive right to move, to requiring that same parent to prove that relocation is in the best interests of the child, to a shifting burden standard that lies somewhere between the other two. Many jurisdictions also employ lists of factors to aid in determining whether to grant a relocation request. While there is substantial overlap on these factor lists among the jurisdictions, all of the factors applicable in one jurisdiction may not address all of the required factors that must be reviewed in another. The differences among the jurisdictions are further compounded by statutes designed to cover the relocation of a custodial parent that have been enacted in numerous states. The combination of the fact-specific nature of relocation disputes and the numerous possible standards that may apply makes it difficult to discern any uniformity in the law governing relocation. However, in the midst of all this uncertainty, some clear patterns have emerged.

There has been a recent trend of states shifting away from presumptions in favor of the custodial parent's right to relocate with the child and, instead, focusing on the best interests of the child as controlling the outcome of any relocation case. This trend is most obvious in the California Supreme Court's decision in LaMusga as well as numerous other examples discussed above. This trend would seem to be a recognition of the belief that a child benefits from frequent and meaningful contact with both parents. By requiring a showing that relocation is in the child's best interests instead of merely applying a presumption based on the nature of the custodial parent's relationship to the child, courts are able to preserve the noncustodial parent's relationship with the child if the facts of the case so warrant it.

As long as marriages disintegrate, there will continue to be relocation disputes between parents. When one parent chooses to relocate from the same geographic area as the other, there will unfortunately be some detrimental effect on the latter's parent-child relationship. The best method available to temper this unfortunate result is to focus on the best interests of the child as the determinative factor in relocation disputes. While this standard may be highly subjective at times, it allows the courts the best opportunity to lessen the potentially deleterious effects on the child of any proposed relocation.
**Divorce Litigation**

**Equitable Distribution Journal**

*Divorce Litigation* is a monthly law journal covering the entire field of family law. It is written from a nationwide viewpoint, and focuses mainly upon issues which normally arise in contested divorce cases. Issues average 16-20 pages per month, and contain an average of 1-3 articles. Recent articles have addressed such topics as distinguishing between active and passive appreciation in separate property, using vocational evidence in spousal support cases, and the effect in family law of the new federal Servicemembers Civil Relief Act.

*Equitable Distribution Journal* is a monthly law journal covering division of property upon divorce in common-law equitable distribution jurisdictions. Each issue contains one main article, plus roughly 3-6 case notes on specific decisions with nationwide impact. The main articles are written from a nationwide viewpoint, and they address major issues of classification, valuation and distribution, often citing cases from as many as twenty different states. Recent articles have addressed such topics as division of veteran's disability benefits, admissibility of valuation evidence obtained from the Internet, unintentional conduct as dissipation of marital property, and division of intellectual property interests.

**The National Legal Research Group** (http://www.nlrg.com), the publisher of both journals, is the nation's oldest provider of research and analysis to practicing attorneys. The editor of both journals is Brett R. Turner, who has been the lead attorney on NLRG's Family Law team since 1985. NLRG has published Divorce Litigation since 1991, and Equitable Distribution Journal since its inception in 1983. Past copies of both publications can be found in the DIVLIT and EQDJ databases on WESTLAW.

---

**Order Form**

Please process my order for a one-year subscription to:

- _____ Divorce Litigation  ($165 per year for 12 issues)
- _____ Equitable Distribution Journal  ($140 per year for 12 issues)

OR

- _____ BOTH JOURNALS AT A SPECIAL RATE OF $265 PER YEAR  ($40 per year less than the regular rate for both journals!)

Please give us your name, firm name (if any), full mailing address, and telephone number:

Return To:
Anne de Angelis
National Legal Research Group, Inc.
P.O. Box 7187
Charlottesville, Virginia 22906-7187
Phone: 800-727-6574   Fax: 434-817-6570