

**AVOIDING ROUND TWO:
THE INADEQUACY OF CURRENT RELOCATION
LAWS AND A PROPOSED SOLUTION.**

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INTRODUCTION

When Amanda was four years old, her parents divorced. After a bitter custody battle, the court awarded sole legal and physical custody to her mother, Melissa. Her father, Ronald, was granted visitation and Amanda spent every Friday, Saturday, and Sunday with him. As Amanda got older, she would walk to her dad's house after school before being picked up by her mom after work. After Amanda's eleventh birthday, Melissa started seeing a man named David who was employed by the National Guard. They got married and soon after, Amanda had a little sister, Audrey. Shortly after Audrey's first birthday, David received deployment orders to patrol the Canadian border in Washington. Melissa informed Ron that as Amanda's sole legal and physical custodian that she would be leaving Texas to move to Washington.¹

Families like Amanda's find themselves heading back to court for a second round of litigation and emotional turmoil when a parent wishes to relocate. The child is again subjected to the painful family court process, where parents engage in costly litigation and once again fight over custody and visitation. The breakup of a family unit is a traumatic event, especially for the children. That trauma continues when parents wish to relocate, starting a second round of arguably needless litigation.

The state of relocation law across the country is in disarray. Individual states have decided relocation issues based on the Uniform Marriage and Divorce Act,² the American Association of Matrimonial Attorneys Model Relocation Act,³ the American Law Institute's Principles of the Law of Family Dissolution,⁴ and their own various versions of these acts.⁵

¹ While names and places have been changed, this factual scenario represents one of the many relocation cases that I had the opportunity to work on as a summer associate at a family law firm.

² 9A U.L.A. 159 (1998).

³ 15 J. AM. ACAD. MAT. LAW 1 (1998).

⁴ AM. LAW. INST. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §2.17 (2000).

With all the different presumptions, burdens, and requirements across the country, it is not surprising that the National Conference of Commissioners on Uniform State Laws has formed a drafting committee to draft a uniform act regarding the relocation of children.⁶ This paper addresses the current problems with relocation laws and proposes a solution significantly different from the current approach of most jurisdictions.

Part I outlines the prior unsuccessful attempts at creating uniformity with the Uniform Marriage and Divorce Act, the American Association of Matrimonial Attorneys Model Relocation Act, and the American Law Institute's Principles of the Law of Family Dissolution. Part II explores the labyrinth of state relocation statutes which elucidates the need for a uniform statute. Part III then argues that in order to reduce post-custody order litigation, minimize emotional trauma to children, and maintain a child-focused approach, the drafters of a uniform law should mandate that parents come to an agreement as to future relocation decisions at the time of the original custody determination. By reaching an agreement, the parents are effectively put on notice that their future choices, be it concerning one's career or relationships, may be limited while children are still minors. In the event that parents are unable to come to an agreement, a uniform law should employ a default provision against relocation. Although adults have protected rights to travel and to rear their children as they see fit, this essay takes the position that a child's right to have both parents in their lives is paramount to any of these parental rights. Thus, parents like Amanda's parents should have been required to reach an agreement when she was four about future relocation. Had they done so, Amanda and her family would have been spared the time, cost, and emotional turmoil that ensued during the relocation dispute.

⁵ See discussion *infra* Part II.

⁶ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=59>

I. PRIOR ATTEMPTS AT A UNIFORM LAW

A. *Uniform Marriage and Divorce Act*

In 1970 the National Conference of Commissioners on Uniform State Laws developed the Uniform Marriage and Divorce Act. The Uniform Marriage and Divorce Act (hereinafter UMDA) was adopted by eight states.⁷ When the UMDA was enacted, the drafters specifically addressed original custody determinations,⁸ visitation,⁹ and custody modifications,¹⁰ but did not specifically address relocation. Relocation has generally been handled under § 409's modification provisions which bars a motion to modify if filed within two years from the original custody decree.¹¹ There is an emergency exception which allows the court to modify an original custody decree upon affidavits showing a reason to believe the child's physical, mental, moral, or emotional health is seriously endangered.¹² After two years, the court may modify an original custody decree upon a showing of changed circumstances that is in the best interests of the child,¹³ but that showing must be predicated upon "facts that have arisen since the prior decree or that were unknown to the court at the time."¹⁴ The children will remain with the custodian unless (1) the custodian *agrees* to the modification; (2) the custodian has consented to the child's *integration* into the non-custodial parent's family and such integration has actually occurred; or (3) the child's present environment *endangers* seriously the child's physical, mental, moral, or emotional health and the harm to the child from the proposed relocation outweighs the

⁷ See UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 159 prefatory note (1998) naming Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington.

⁸ UNIF. MARRIAGE AND DIVORCE ACT, § 402, 9A. U.L.A. 282 (1998).

⁹ *Id.* § 407 at 398.

¹⁰ *Id.* § 409 at 439.

¹¹ *Id.* § 409(a).

¹² *Id.*

¹³ *Id.* § 409(b).

¹⁴ *Id.*

advantages of the proposed relocation.¹⁵

In enacting § 409 of the UMDA, the drafters intended to “maximize finality (and thus assure continuity for the child) without jeopardizing the child’s interest.”¹⁶ An analysis of the individual states that have adopted the UMDA reveals a common problem. The UMDA is no longer uniform. The jurisdictions adopting the UMDA have modified, amended, and omitted language to their individual liking¹⁷ resulting in an act that is anything but uniform and rendering the UMDA an inadequate tool for handling the relocation problem in a uniform manner. Even if all eight states had adopted the UMDA provisions in their entirety, including the two-year waiting period, the final result falls short of this goal. Children whose parents’ relationships have dissolved not only suffer trauma during the dissolution, but also suffer long-term residual effects.¹⁸ Therefore, the UMDA’s condition restricting a parent’s initial petition for modification two years after the final order does not maximize finality and assure continuity, but may do just the opposite by re-opening the wounds from the initial dissolution. Depending on what state has jurisdiction, this may very well occur at a critical time when the initial injury is in the process of healing.¹⁹

B. American Academy of Matrimonial Lawyers Model Relocation Act

In 1998, the American Academy of Matrimonial Lawyers proposed a Model Relocation Act (hereinafter Model Act).²⁰ The introductory comment to the Model Act indicates that the statute is not intended to be a uniform act, but to “serve as a template” for states to use in

¹⁵ *Id.* (emphasis added).

¹⁶ *Id.* § 409 comment.

¹⁷ See discussion *infra* Part II.

¹⁸ Judith S. Wallerstein, *The Long-Term Effects of Divorce on Children: A Review*, 30 J. AMER. ACAD. CHILD & ADOLESCENT PSYCH. 349 (1991).

¹⁹ *Id.*

²⁰ 15 J. AM. ACAD. MAT. LAW 1 (1998). For an overview of the Model Act, see Janet Leach Richards, *Children’s Rights v. Parents’ Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. REV. 245, 277-78 (1999).

enacting their own relocation statutes.²¹ It requires that all parties notify the other parties within 60 days of a proposed change of address.²² Among other things, the notice must include the reasons for the move and a proposed revised visitation.²³ If the non-relocating parent does not file an objection to the relocation or new proposed visitation plan within thirty days, the relocation goes forward.²⁴ If the non-relocating parent files a timely objection, the court must conduct a hearing to determine a final outcome in which they look at the following eight factors: (1) the nature, quality, extent of involvement, and duration of the child's relationship with the parents, other adults, and siblings; (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; (3) the feasibility of preserving the relationship between the non-relocating person and the child through suitable visitation arrangements; (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 person seeking the relocation, either to promote or thwart the relationship of the child and the non-relocating person; (6) whether the relocation of the child will enhance the general quality of life for both the custodial party seeking the relocation and the child; (7) the reasons of each person for seeking or opposing relocation; and (8) any other factor affecting the best interests of the child.²⁵

The Model Act then outlines three alternatives in assigning the burden of proof.

Alternative A assigns the burden on the relocating person to show that the proposed relocation is made in good faith and in the best interests of the child.²⁶ Alternative B assigns the burden to

²¹ *Id.* at 2.

²² *Id.* § 203, at 7–9.

²³ *Id.* § 203(b)(5-6), at 8.

²⁴ *Id.* § 301, at 13–14.

²⁵ *Id.* § 405, at 18–19.

²⁶ *Id.* § 407, at 20–22.

the non-relocating person to show that the proposed relocation is made in good faith, but not in the best interests of the child.²⁷ Alternative C employs a burden shifting approach with the party seeking relocation to show that the proposed relocation is made in good faith followed by a shift to the non-relocating party to show that the proposed relocation is not in the best interests of the child.²⁸ The Model Act could have served as a useful tool in assisting state legislatures in drafting statutes specific to relocation. Unfortunately, the language of the Model Act was only adopted by a handful of states.²⁹ As one commentator noted, the downfall of the Model Act is the fact that it does not advocate for one approach that states should adopt.³⁰ This lack of advocacy perpetuates the problem of non-uniformity in the relocation arena.

C. American Law Institute's Principles of the Law of Family Dissolution

In 2000, the American Law Institute published their analysis and recommendations in the field of family law. Included in their analysis was a specific provision regarding the relocation of a parent.³¹ The American Law Institute's Principles (hereinafter Principles) outline that in order for a relocation to constitute a substantial change of circumstances, triggering modification under § 2.15, the relocation must significantly impair either parent's ability to exercise the responsibilities they have been exercising under the current parenting plan.³² The Principles require that any parent who has some responsibility under a parenting plan, even a non-custodial parent with visitation, provide 60 days notice of an intent to relocate.³³ If the court finds that there would be a substantial change in circumstances, the court should revise the parenting plan

²⁷ *Id.*

²⁸ *Id.*

²⁹ See discussion *infra* Part II.

³⁰ Richards, *supra* note 20 at 278.

³¹ AM. LAW. INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.17 (2000). For an overview, see Janet Leach Richards, *Resolving Relocation Issues Pursuant to the ALI Family Dissolution Principles: Are Children Better Protected?*, 2001 BYU. L. REV. 1105, 1112-1117.

³² *Id.* § 2.17(1).

³³ *Id.* § 2.17(2)

to accommodate the relocation without changing the proportion of custodial responsibilities each parent is currently exercising.³⁴ If it is impractical for the court to maintain the proportion of custodial responsibilities, the court should modify the parenting plan in accordance with the child’s best interests.³⁵ There is a presumption in favor of allowing a parent who is exercising the clear majority of custodial responsibility to relocate with the child as long as the parent can show that the relocation has a valid purpose, is made in good faith, and is to a location that is reasonable in light of its purpose.³⁶ The Principles outline that what constitutes a “‘clear majority’ of custodial responsibility should be established through a rule of statewide application”³⁷ and recommend that the amount set by such a rule take into account the reasonable assumption that impairment of the relationship between the child and the parent having the most custodial time is more detrimental to the child than the impairment of the relationship between the child and the other parent.³⁸ The purpose of the relocation is valid if it is to be close to family or other sources of support, for health reasons, to protect the safety of one’s family, for significant employment or educational opportunities of the parent or their new partner, or to significantly improve the family’s quality of life.³⁹ The move is for a valid purpose unless the court finds that its purpose can be achievable without moving or moving to a location that is less disruptive to the other parent’s relationship with the child.⁴⁰ If the parent exercising the clear majority of time with the child does not establish that the relocation is valid, in good faith, and to a location that is reasonable in light of its purpose, it does not mean that the parent cannot relocate with the child. Instead, the court must conduct a best interests analysis to

³⁴ *Id.* § 2.17(3).

³⁵ *Id.* § 2.17(4).

³⁶ *Id.* § 2.17(4)(a).

³⁷ *Id.* § 2.17(4)(a)(i).

³⁸ *Id.* at 361 (A simple majority of 51 percent should not be enough to trigger the substantial latitude this section extends to the relocating parent. A percentage between 60 and 70 percent falls within a reasonable threshold range.)

³⁹ *Id.* § 2.17(4)(a)(ii).

⁴⁰ *Id.* at §2.17(4)(a)(iii).

determine whether custody should be reallocated to the non-moving parent or whether to modify the current custodial arrangement to allow for relocation.⁴¹ In cases where neither parent has been exercising a clear majority of custodial responsibility, the court must conduct a “best interests” analysis.⁴²

The Principles make a valiant attempt to streamline the process of relocation by the addition of presumptions in favor of relocation. Yet, its deference to individual states to determine what constitutes a clear majority of custodial responsibility is a downfall. It does not provide for uniformity. In addition, it does not take into account the many different ways in which parents exercise responsibility for their child, including psychological, emotional, financial, educational, and social responsibility. Finally, the Principle’s fallback on the “best interests” analysis only perpetuates the problem of re-litigating the exact custodial arrangements that were previously established at a high emotional and financial cost to the parties.

II. THE CURRENT STATE OF RELOCATION LAW

An analysis of the current statutes of the 50 states glaringly illuminates the need for a uniform law. The statutory language ranges from rebuttable presumptions for relocation, rebuttable presumptions against relocation, burdens on the relocating parent, burdens on the non-relocating parent, burdens on the party seeking a modification, shifting burdens, modifications in the best interests of the child upon a showing of a change in circumstances, defined differently in every jurisdiction, and analyses dependent on how much time a child actually spends with each parent. Based on the various intricacies of each statute, it is impossible to group the states into precise, delineated categories. Nevertheless, this author has attempted to provide broad categorical groupings of states with presumptions, burdens, and best interests of the child

⁴¹ *Id.* § 2.17(4)(b).

⁴² *Id.* § 2.17(4)(c).

analyses. Within these broad categories, the variations prove to be abundant.

A. Presumption States

1. Presumption in Favor of Relocation

Nine states employ a presumption in favor of relocation either through case law or statute. Washington and Minnesota have enacted the UMDA, but have amended their statutes to deal with relocation issues. Washington's statute closely resembles the AAMA's Model Relocation Act, but holds onto UMDA's § 409 language when determining whether the objecting party has adequately rebutted the presumption in favor of relocation.⁴³ Minnesota's modification statute is nearly identical to the UMDA, except with a presumption that the child will remain with the custodian.⁴⁴ Oklahoma⁴⁵ and South Dakota⁴⁶ have identical relocation statutes that read: "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."

Many states have relied on case law to form their presumption in favor of relocation. Arkansas relocation decisions are governed by case law, not a specific relocation statute.⁴⁷ All custody determinations are made under its "award of custody" statute.⁴⁸ Case law indicates that a presumption exists in favor of relocation for custodial parents with primary custody.⁴⁹ The non-custodial parent has the burden to rebut the relocation presumption.⁵⁰ California adopted

⁴³ WASH. REV. CODE ANN. § 26.09.260 (West 2005).

⁴⁴ MINN. STAT. ANN. § 518.18(d) (West. Supp. 2008).

⁴⁵ OKLA. STAT. ANN. tit. 10, § 19 (West 2007).

⁴⁶ S.D. CODIFIED LAWS § 25-5-13 (2008).

⁴⁷ *Hollandsworth v. Knyzewski*, 109 S.W.3d. 653 (Ark. 2003).

⁴⁸ ARK. CODE ANN. § 9-13-101 (2008).

⁴⁹ *Hollandsworth*, 109 S.W.3d at 657.

⁵⁰ *Id.*

the reasoning in the landmark case of *In re Marriage of Burgess*⁵¹ which outlines that a custodial parent has the right to change the residence of a child.⁵² In Wyoming a court may modify custody if there is a showing by either parent of a material change in circumstances since the entry of the order and that the modification would be in the best interests of the child.⁵³ In analyzing the best interests of the child, case law indicates that if “the court is satisfied with the motives of the custodial parent in seeking the move and reasonable visitation is available to the remaining parent, removal should be granted.”⁵⁴

Although Iowa’s 2005 enactment of a relocation provision is not explicit in its presumption in favor of relocation, the language of the statute is implicit. Relocation of more than 150 miles is considered a substantial change in circumstances and the court shall modify the custody order to at a minimum preserve as nearly as possible the existing relationship between the minor child and the non-relocating parent.⁵⁵ Like Iowa, Utah’s relocation statute maintains an implicit presumption in favor of relocation. If a parent moves from the state or 150 or more miles the relocating parent is required to provide 60 days notice.⁵⁶ The court may make appropriate orders regarding the parent-time and costs for parent-time transportation with specific provisions for parent-time with school age children.⁵⁷

2. Presumption Against Relocation

Only two states have presumptions against relocation. Alabama’s general philosophy is

⁵¹ *In Re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996) (holding that if the move is in best interests of child, the court need not reexamine the questions, but should instead preserve established mode of custody unless some significant change in circumstances indicates that different arrangement would be in child’s best interests)

⁵² CAL. FAM. CODE § 7501 (West 2004).

⁵³ WYO. STAT. ANN. § 20-2-204(c) (2007).

⁵⁴ *Harshberger v. Harshberger*, 117 P.3d 1244, 1249 (Wyo. 2005).

⁵⁵ IOWA CODE ANN. § 598.21D (West Supp. 2007).

⁵⁶ UTAH CODE ANN. §30-3-37 (2008).

⁵⁷ *Id.*

that children need both parents, even after divorce.⁵⁸ Under its relocation statute, unless a party objecting to the relocation is found to have committed domestic violence or child abuse, there is a rebuttable presumption against relocation.⁵⁹ If the burden is met by the relocating parent by showing that the move is in the child's best interests, then the burden shifts to the non-relocating parent.⁶⁰ South Carolina also employs a presumption against removing the child from the state which may only be rebutted by showing that the move will benefit the child.⁶¹

3. Presumption Based on Parent's Actual Time with Child

Three states take an approach that looks at the current allocation of parental responsibilities and time spent with the children in making relocation decisions. Following the ALI principles, in Tennessee, if the parents spend substantially equal intervals of time with the child, the non-relocating party may file an opposition and the court shall determine whether or not to permit the relocation based on the best interests of the child.⁶² If parents are not actually spending substantially equal time with the children, the parent spending the greater amount of time with the child will be permitted to relocate unless the court finds that the relocation doesn't have a reasonable purpose, relocation would pose a threat of specific and serious harm to the child that outweighs the threat of harm to the child of a change of custody, or the parent's motive for relocation is vindictive.⁶³ Also following the ALI principles, West Virginia employs a presumption that the parent who has been exercising the significant majority of the custodial responsibility should be allowed to relocate if they can show the relocation is in good faith and for a legitimate purpose and to a location that is reasonable in light of the purpose.⁶⁴ In

⁵⁸ ALA. CODE §§ 30-3-160 to -169.10 (LexisNexis Supp. 2007).

⁵⁹ *Id.* § 30-3-169.4.

⁶⁰ *Id.*

⁶¹ *Rice v. Rice*, 517 S.E.2d 220 (S.C. Ct. App. 1999).

⁶² TENN. CODE ANN. § 36-6-108(c) (2007).

⁶³ *Id.* § 36-6-108(d).

⁶⁴ W. VA. CODE § 48-9-403(d)(1) (2004).

Wisconsin there is a rebuttable presumption that continuing the current allocation of decision making or continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.⁶⁵

B. Burden States

Rather than rebuttable presumptions in favor of or against relocation, some courts place the burden of proof on particular parties in order to grant or deny relocation. In some states, the burden of proof remains with the parent who wishes to relocate, whereas in others, the burden of proof is on the parent who is opposing the relocation and seeking a modification of the current custodial arrangement. Finally, some states shift the burden between the parties.

1. Burden on Relocating Parent

Eleven states require that the relocating parent meet a burden of proof before being allowed to relocate with the child. Although Illinois, Missouri, and Arizona adopted the UMDA, they amended their statutes to create a burden on the relocating parent. In Illinois, the custodian seeking removal has the burden of proving that removal is in the child's best interests.⁶⁶ In Arizona, if a custodian wishes to relocate outside of the state or more than 100 miles within the state, they have the burden of showing that the relocation is in the child's best interests.⁶⁷ Missouri's statute is modeled after the AAMA's Model Relocation Act. It provides that the party seeking to relocate with the child has the burden of proving that the relocation is made in good faith and is in the best interests of the child.⁶⁸ Louisiana has also adopted the Model Act and places the burden on the relocating parent to show that the proposed relocation is made in

⁶⁵ WIS. STAT. ANN. §767-481(3)(a)(2)(a) (West Supp. 2007).

⁶⁶ 750 ILL. COMP. STAT. ANN. §5/609(a) (LexisNexis 2007).

⁶⁷ ARIZ. REV. STAT. ANN. § 25-408 (2007).

⁶⁸ MO. REV. STAT. § 452-377 (West 2006).

good faith and is in the best interests of the child based on a number of different factors.⁶⁹

While not specifically following the UMDA or the Model Act, some states have enacted specific provisions regarding relocation. Michigan's relocation statute outlines that no parent shall change the child's residence more than 100 miles, unless consented to by the other parent, or if the court permits the residence change after consideration of many different factors.⁷⁰ In Nevada, if one parent has been awarded primary custody, the primary custodian has the burden on showing that an "actual advantage" will be realized by both the children and the custodial parent in moving.⁷¹ Nevada has a different standard for joint custody situations.⁷² Other states have not enacted specific relocation statutes and continue to deal with relocation issues through their general modification statute. Maine⁷³, Nebraska⁷⁴, Ohio⁷⁵, Texas⁷⁶, and North Dakota⁷⁷ employ this framework and place the burden of proof on the relocating parent.

2. Burden on Parent Opposing Relocation and seeking modification

Five states place the burden on the parent who opposes the relocation and is seeking modification of custody. Maryland⁷⁸, Vermont⁷⁹, and Indiana⁸⁰ place the burden on the opposing parent to show that the move constitutes a change in circumstances triggering a modification hearing. If established, the court then addresses the child's best interests. In Mississippi the opposing parent also has the added burden of showing that the best interests of

⁶⁹ LA. REV. STAT. ANN. §9.355.13 (West Supp. 2008).

⁷⁰ MICH. COMP. LAWS ANN. § 722-31(4) (West 2005).

⁷¹ NEV. REV. STAT. § 125C.200 (2004).

⁷² See *infra* note 95 and accompanying text.

⁷³ ME. REV. STAT. ANN. tit. 19A, § 1657(2)(A)–(A-1) (2008).

⁷⁴ NEB. REV. STAT. § 42-364(6) (2004); *Wild v. Wild*, 696 N.W.2d 886 (Neb. 2005).

⁷⁵ *Rodkey v. Rodkey*, 2006 WL 2441720 (Ohio Ct. App. 2006).

⁷⁶ TEX. FAM. CODE ANN. § 156.101 (Vernon Supp. 2007).

⁷⁷ N.D. CENT. CODE § 14-09-06.6(8) (2007).

⁷⁸ MD. CODE ANN., FAM. LAW § 9-106 (West 2006).

⁷⁹ VT. STAT. ANN. tit. 15, § 668 (2007 LexisNexis Supp.); *Hawkes v. Spence*, 878 A.2d 273 (Vt. 2005).

⁸⁰ IND. CODE ANN. § 31-17-2-21 (LexisNexis 2003).

the child require a change in custody.⁸¹ In Idaho the burden is on the party seeking the modification to establish that the modification is in the child's best interests.⁸²

3. Shifting Burden

Three states employ a burden shifting framework. In Connecticut⁸³ and New Hampshire⁸⁴ a custodial parent bears the initial burden of demonstrating that the relocation is for a legitimate purpose and the proposed relocation is reasonable in light of that purpose. After a prima facie showing, the burden shifts to the non-custodial parent to prove that the relocation would not be in the child's best interests. Similarly, New Jersey places the burden on the custodial parent to prove that there is a good faith reason for the move and that the child will not suffer from it, which then shifts to the non-custodial parent to prove that the move is either not in good faith or inimical to child's interests.⁸⁵

C. Modification States

1. Best Interests of the Child Analysis

Thirteen states continue to deal with relocation issues as an analysis of the child's best interests. Although Colorado, Kentucky, and Montana adopted the UMDA, they continue to deal with relocation strictly as an issue of modification. Montana's statute is substantially similar to the UMDA except that it omits the presumption that the child will remain with the custodian, instead making a new determination based on the best interests of the child.⁸⁶ Kentucky's statute is nearly identical to the UMDA⁸⁷ except that it allows for the temporary modification of a custody decree upon active duty deployment in the Armed Forces or National

⁸¹ MISS. CODE ANN. § 93-5-24 (West 2004); *Lambert v. Lambert*, 872 So. 2d 679, 683-84 (Miss. Ct. App. 2004).

⁸² IDAHO CODE ANN. § 32-717 (LexisNexis Supp. 2007).

⁸³ CONN. GEN. STAT. ANN. § 46b-56 (West. Supp. 2008); *Ireland v. Ireland*, 717 A.2d 676 (Conn. 1998).

⁸⁴ N.H. REV. STAT. ANN. § 461-A:12 (West Supp. 2007).

⁸⁵ N.J. REV. STAT. § 9:2-2 (2002).

⁸⁶ MONT. CODE. ANN. § 40-4-219 (2007).

⁸⁷ KY. REV. STAT. ANN § 403.340 (LexisNexis Supp. 2007).

Guard with an automatic reversion to the previous custody decree upon termination of active duty.⁸⁸ Colorado's statute is substantially similar to the UMDA.⁸⁹

The remaining ten states approach relocation disputes through varied forms of a best interest analysis. In Alaska⁹⁰, Hawaii⁹¹, New York⁹², Rhode Island⁹³ and Oregon⁹⁴ a court may modify a custodial arrangement if it is in the best interests of the child. Nevada deals with relocation disputes in joint custody cases under a best interests approach.⁹⁵ New Mexico⁹⁶ and North Carolina⁹⁷ courts may modify custody arrangements if there is a showing of changed circumstances. Likewise, in Massachusetts, if a child has been domiciled in the state for five years, the child may not be removed from the state, unless the court "upon cause shown otherwise orders."⁹⁸ Delaware has adopted a strict position on modifications, allowing modification only if it finds that continued enforcement of the order will endanger the child, or in the event of any harm to the child, the compliance of the parents, and the best interests of the child, depending on the timing of the petition.⁹⁹

2. Analysis of Factors Specific to Relocation Issues

A few states have enacted statutes that outline factors specific to a relocation case that differ from the general best interest analysis. In Florida, a court must consider the following factors: (1) would the move improve the general quality of life for both the residential parent and child, (2) extent that visitation rights have been allowed and exercised, (3) will primary parent

⁸⁸ *Id.* § 403.340(5).

⁸⁹ COLO. REV. STAT. § 14-10-131 (2007).

⁹⁰ ALASKA STAT. § 25.24.150 (2006).

⁹¹ HAW. REV. STAT. § 571-46 (2006).

⁹² N.Y. DOM. REL. LAW § 240 (McKinney 1999); *Tropea v. Tropea*, 665 N.E.2d 145 (N.Y. 1996).

⁹³ R.I. GEN. LAWS § 15-5-16 (2003).

⁹⁴ OR. REV. STAT. ANN. § 107.159 (West 2007).

⁹⁵ NEV. REV. STAT. § 125.510 (2004).

⁹⁶ N.M. STAT. ANN. § 40-4-7(G) (West 2004).

⁹⁷ N.C. GEN. STAT. ANN. § 50-13.7 (West 2007).

⁹⁸ MASS. GEN. LAWS ANN. ch. 208, § 30 (2006).

⁹⁹ Del. Code Ann. tit. 13, § 729(c)(1) (LexisNexis Supp. 2006).

comply with visitation orders, (4) will substitute visitation be adequate to foster a continuing meaningful relationship with child and other parent, (5) is cost of transportation affordable by one or both parents, (6) best interests of child.¹⁰⁰ Likewise, Kansas courts considers all factors including the best interests of the child, the effect of the move on a parent having rights, and the increased cost of the move on a party seeking to exercise rights when dealing with relocation issues.¹⁰¹ In Pennsylvania, the analysis is a combination of the best interests analysis and existing case law which outlined several factors specific to relocation, including whether the move will improve the quality of life of the relocating parent and the children, whether the custodial parent is seeking to frustrate the visitation rights of the non-custodial parent, and whether the non-custodial parent's resistance is inspired solely by a desire to maintain a close, on-going, parent-child relationship.¹⁰²

3. No Requirements to Modify Custody

Lastly, two states have no guidelines for relocation cases. Georgia allows a modification every two years upon motion by a party or upon motion by the court without the necessity of any showing of a change in any material conditions and circumstances of either party or the child.¹⁰³ Virginia has no provisions regarding the standard for relocation; it simply requires a 30 day notification of an intent to relocate.¹⁰⁴

III. A PROPOSED APPROACH TO THE DRAFTING OF A UNIFORM ACT

The disorder of the various state approaches to relocation makes it clear that a uniform law is crucial. A uniform act should be drafted to accomplish three goals. First, it should reduce litigation, therefore minimizing the burden on the court system and minimizing expense to the

¹⁰⁰ FLA. STAT. ANN. § 61.13(2)(d) (West 2006).

¹⁰¹ KAN. STAT. ANN. § 60-1620 (2007).

¹⁰² 23 PA. CONS. STAT. ANN. § 5308 (West 2001); Gruber v. Gruber, 583 A.2d 434, 439-40 (Pa. Super. Ct. 1990).

¹⁰³ GA. CODE ANN. § 19-9-3 (LexisNexis Supp. 2007).

¹⁰⁴ VA. CODE ANN. § 20-124.5 (West 2004).

parties. Second, it should minimize the emotional trauma on children associated with family court conflicts. Finally, it should hold the child's rights to stability and continuity as paramount to a parents' right to travel and rear their children. The following proposal is an attempt to accomplish these three goals by requiring parents to form pre-emptive agreements regarding relocation at the time of the original custody determination. In the event that parents cannot come to a suitable agreement, there is a default provision against relocation. It also provides for exceptions in circumstances where a parent is not exercising their rights under the current custody arrangement and in cases of domestic violence.

A. Pre-emptive Agreements

Under the current models for a uniform act, none require parents to reach pre-emptive agreements in the event of future relocations. The UMDA, the Model Act, and the Principles employ the standard tools of presumptions, burdens, and the best interests of the children. None take a pro-active approach, nor do they recognize that relocation may be an issue for the parties to resolve through methods other than full-blown litigation.

The current statutory scheme in all states requires extensive litigation. There is no empirical evidence showing that jurisdictions employing presumptions in favor of or against relocation have reduced litigation.¹⁰⁵ In addition, jurisdictions that allow modification of the current custodial arrangement when it is in the child's best interests have created a revolving door of re-litigation every time a parent is dissatisfied with the current arrangement. As one dissenting judge noted, "an amorphous best-interest-of-the-child-standard will leave the trial courts free to consider any circumstance in a child's life as a potential reason to uproot the

¹⁰⁵ See generally Lyn R. Greenberg, Dianna J. Gould-Saltman & Hon. Robert Schneider, *The Problem with Presumptions—A Review and Commentary*, in *RELOCATION ISSUES IN CHILD CUSTODY CASES* 139, 146 (Philip M. Stahl & Leslie M. Drozd eds., 2006) (finding no controlled studies demonstrating that presumptions have been effective in reducing child custody litigation).

child.”¹⁰⁶

Because the current statutory scheme is inadequate to prevent re-litigation of custody agreements whenever a parent wishes to relocate, the drafters of a uniform act should require parental agreements that address the potential future relocation of a custodial parent, a non-custodial parent, or a joint-custodial parent upon dissolution of unions and awards of custody. Other commentators have suggested the legitimacy of this approach.¹⁰⁷

This approach makes sound sense from a number of different perspectives. Parents are encouraged to agree upon custody and visitation when establishing the original custody order. Courts rarely disregard the parties’ agreements, unless the agreement appears to not be in the child’s best interests. Moreover, it is more likely that the parents can come to mutually agreeable terms if an imminent relocation is not on the table. If the parties are discussing a possible future relocation, the threat to the non-relocating parent’s relationship is not immediately present. This may allow for the parents to proactively address and alleviate any fears or concerns about relocation issues and hash out any differences before the problem is right in front of them. If parents are required to agree upon the terms of a potential future relocations, the chances of a relocation issue coming before the court in a contested litigation setting is greatly reduced. In addition, it puts the parents on notice that their future choices may be limited by their own agreements as to future relocation.

Of course, there may be cases in which parents and their respective attorneys are unable to reach an agreement regarding the potential future relocation of a parent. In these cases, a

¹⁰⁶ Bodne v. Bodne, 588 S.E.2d 728, 731 (Ga. 2003)(J. Benham, dissenting).

¹⁰⁷ Hon. W. Dennis Duggan, *Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation*, 45 FAM. CT. REV. 193, 210 (2007) (“[W]e must create a process that encourages, empowers, and commands parents to reach joint decisions.”); Nancy Zalusky Berg & Gary A. Debele, *Post-Decree Custody Modification: Moving Out of State and Changes to the Parenting Relationship*, 10 AM. J. FAM. L. 183, 203 (1996) (“It also would make sense to allow parties to write terms regarding removal into their divorce decrees and trust these will be enforceable absent a conflict with the child’s best interests. Then, parties will be on notice as to what having custody or not having custody will mean in terms of their future planning.”) (emphasis in original).

uniform statute should require the parties to engage in mediation, specialized alternative dispute resolution, or other alternative dispute resolution processes before informing the court that they were unsuccessful in reaching an agreement.

By requiring parents to engage in mediation or a form of alternative dispute resolution prior to resorting to the discretion of the judicial system, the odds are in favor of the parents reaching a satisfactory agreement and avoiding litigation. More importantly, engaging in mediation or alternative dispute resolution may alleviate some of the emotional and scholastic damage of acrimonious litigation.¹⁰⁸ Custody disputes and litigation are extremely traumatic for the children involved. Children in separated and divorced families suffer long term effects.¹⁰⁹ During the initial disruption of the dissolution, children are afraid of being abandoned, and worry about being supported and protected.¹¹⁰ This is only exacerbated in a disputed relocation case.

In addition, requiring the parents to pre-emptively agree on how to resolve future relocation issues results in child's rights being paramount. A parent's decision to relocate usually has more to do with their own personal wellbeing than that of their child's. By requiring parents to reach an advance agreement, they are not necessarily forced to put their interests behind their children's interests when hashing out the terms of the agreement. Rather, an agreement is itself child-focused because there is a set agenda for any future relocation disputes. There is no uncertainty. There are no unknowns. Assuring true finality to an original custody order puts the child's rights to stability and continuity ahead of any perceived parental rights.

B. Absent Parental Agreement: Default Position Against Relocation

Under the current models for a uniform act relating to the relocation of children, none

¹⁰⁸ Andrew Shepard, Joan Atwood & Stephen W. Schlissel, *Preventing Trauma for the Children of Divorce Through Education and Professional Responsibility*, 16 NOVA L. REV. 767, 781 (1992).

¹⁰⁹ Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305 (1996-1997).

¹¹⁰ *Id.* at 309.

take the decision-making away from the court and apply default positions. All three models allow for the court to exercise discretion in a contested relocation decision, whether through deciding that a presumption has been effectively rebutted, or that a party has met its burden of proof. Rather than a system with presumptions or burdens where the court still exercises great discretion in decision-making, a default provision would effectively remove court discretion in relocation decisions. For the minority of cases where parents are still unable to agree after mediation or a form of alternative dispute resolution, they would then be subject to the uniform statute's default position. By employing a default position in the event that they can't agree, the parents would be on notice as to their future planning dependent on their custodial situation absent an agreement to the contrary.¹¹¹ A default provision against relocation is a child-focused approach that minimizes the emotional turmoil to children and reduces litigation.

Contrary to presumptions or burdens, a default provision would significantly reduce litigation. The court is effectively removed from making discretionary judgments about the child's best interests, whether the parties have met their burdens of proof, or whether a presumption has been sufficiently rebutted. If parents are not able to come to an agreement at the time of the original custody decree, the court's hands are tied and the parties are on notice that no further litigation will ensue in the event of a future relocation dispute.

A default provision against relocation would functionally minimize emotional trauma to children. Children want to be near both their parents, even if they can't have them living in the same house together and see the best possible scenario after divorce as "parents who . . . live close enough to each other so that child can have the same playmates when with either

¹¹¹ Schepard et al., *supra* note 108, at 781; Zalusky & Debele, *supra* note 107.

parent.”¹¹² According to one scholar, once a child and non-residential parent live twenty minutes away from each other, the child’s life and activities are necessarily fragmented in order to sustain the parent-child relationship.¹¹³ Stability and continuity are important for children. Parents bear the responsibility of maintaining stability and continuity with both parents to the extent possible because both parents are primary to the child’s development.¹¹⁴ Children have a right to stability and continuity in their daily lives and this includes a right to have access to both parents. This right needs to be seen as paramount to a parent’s right to mobility.

Social science research is inconclusive regarding whether access to both parents is critical to a child’s wellbeing.¹¹⁵ Some researchers feel that frequent and continuing access to both parents does not lie at the core of the child’s best interests.¹¹⁶ Other researchers feel that “children benefit from the extensive contact with both parents that fosters meaningful father-child and mother-child relationships.”¹¹⁷ While this position is controverted in the research field, most mental health professionals agree that children are better when they have contact and good relationships with both parents.¹¹⁸ Seeing as there is no consensus and there is research supporting both positions, it seems prudent when discussing the emotional well-being of a child to err on the side of access to both parents being critical. Social science research has consistently shown that relocation disturbs the child’s relationship with the non-custodial parent. As Marion Gindes argues, “[t]he greater the distance between the child and the nonresidential parent, the

¹¹² Marion Gindes, *The Psychological Effects of Relocation for Children of Divorce*, 10 J. AM. ACAD. MATRIM. LAW. 119, 119 (1998) (citing Michael E. Lamb et al, *The Effects of Divorce and Custody Arrangements on Children’s Behavior, Development, and Adjustment*, 35 FAM. & CONCILIATION CTS. REV. 393 (1997); Joan B. Kelly, *The Best Interests of the Child: A Concept in Search of Meaning*, 35 FAM. & CONCILIATION CTS. REV. 377 (1997).

¹¹³ Leslie Ellen Shear, *Life Stories, Doctrines and Decision-Making: Three High Courts Confront the Move-Away Dilemma*, 34 FAM. AND CONCILIATION CTS. REV. 439, 441 (1996).

¹¹⁴ Gindes, *supra* note 112, at 111.

¹¹⁵ *Id.* at 134.

¹¹⁶ Wallterstein & Tanke, *supra* note 109, at 311.

¹¹⁷ Joan B. Kelley & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297, 309 (2000).

¹¹⁸ Gindes, *supra* note 112, at 132.

less likely that the nonresidential parent can assume the traditional parental roles or participate in the ordinary activities of a child's life. Contact with the nonresidential parent becomes special and takes both the child and the parent away from their normal routines."¹¹⁹ When children have a long distance parenting plan with a parent, the nature of the relationship automatically changes and the nonresidential parent can no longer play an effectual role in the child's daily life.¹²⁰ The child falls outside of the parent's "sphere of influence."¹²¹ This qualitative shift in the nature of the parent-child relationship has a greater impact on younger children. Research suggests that very young children's attachment relationship is fundamentally altered by relocation.¹²² As children pass through toddler age and approach school-age, the effects are lessened, but the functional obstacles to parental involvement remain fairly discouraging.¹²³ When children reach elementary school age, the logistics of long distance parenting become more feasible as telephone contact is more viable and extended summer parenting time is an option.¹²⁴ Relocation has long-term negative outcomes for children. According to Braver, Ellman, and Fabricius, relocation results in "a preponderance of negative effects associated with parental move by mother or father, without or without the child, as compared with divorced families in which neither parent moved away."¹²⁵

¹¹⁹ *Id.* at 135.

¹²⁰ William G. Austin & Jonathan W. Gould, *Exploring Three Functions in Child Custody Evaluation for the Relocation Case: Prediction, Investigation, and Making Recommendations for a Long-Distance Parenting Plan*, in RELOCATION ISSUES IN CHILD CUSTODY CASES 63, 99 (Philip M. Stahl & Leslie M. Drozd eds., 2006).

¹²¹ *Id.*

¹²² Joan B. Kelly & Michael E. Lamb, *Developmental Issues in Relocation Cases Involving Young Children: When, Whether, and How?*, 17 J. FAM. PSYCHOL., (2003).

¹²³ Gindes, *supra* note 112, at 140.

¹²⁴ *Id.*

¹²⁵ Sanford L. Braver, Ira M. Ellman & William V. Fabricius, *Relocation of Children after Divorce and Children's Best Interests: New Evidence and Legal Considerations*, 17 J. FAM. PSYCHOL. 206, 214 (2003). The research found that there were significant differences between children of divorced parents who moved and children of divorced parents who didn't move in eleven of the fourteen variables: "received less financial support from their parents (even after correcting for differences in the current financial conditions of the groups), worried more about that support, felt more hostility in their interpersonal relations, suffered more distress related to their parents' divorce, perceived their parents less favorably as sources of emotional support and as role models, believed the quality of

As a solution to the relocation problem, courts have historically been fashioning suitable visitation and long distance parenting plans to maintain the same amount of contact between the nonresidential parent and the child as before the relocation. While it is the nature of the contact and not the frequency that is important to the parent-child relationship,¹²⁶ taking a parent out of the customary parental roles of monitoring homework, attending school events, spending holidays together, making decisions, and discipline and putting them into a role as a vacation parent significantly alters the relationship.¹²⁷ Courts that allow long distance relocations under the guise that they are not altering a nonresidential parent's access to the children in terms of overall number of days with the children are fooling themselves. As children get older, they become more social and their self-esteem and identity is rooted in their peer relationships. School age children want to spend their school and summer vacations with their friends, not with their parents. By requiring a child to be uprooted from their community to return to the nonresidential parent's home is disruptive and causes resentment. It is not an unlikely scenario for the children to eventually stop spending their vacations with the nonresidential parent to the ultimate demise of the parent-child relationship.

A child-focused approach is critical because in relocation cases the rights of the parents often come into conflict with the rights of children.¹²⁸ Historically, courts resolving relocation issues have seen the interests of the relocating parents as synonymous with the best interests of the children.¹²⁹ Children's rights have largely been ignored in this country.¹³⁰ Courts have seen

their parents' relations with each other to be worse, and rated themselves less favorably on their general physical health, their general life satisfaction, and their personal and emotional adjustment." *Id.*

¹²⁶ *Id.* at 135.

¹²⁷ *Id.*

¹²⁸ Gary A. Debele, *A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard*, 10 J. AM. ACAD. MATRIM. LAW. 75, 102 (1998).

¹²⁹ *Id.*; Zalusky Berg & Debele, *supra* note 108.

¹³⁰ Jerry A. Bahnke, *Pawns or People? Protecting the Best Interests of Children in Interstate Custody Disputes*, 28 LOY. L.A. L. REV. 699, 731 (1995).

a parent's right to travel and pursue career opportunities as paramount to the child's right to maintain stability and continuity in their relationships with both parents.¹³¹ It is time that family courts begin focusing on the child's rights as paramount to their parents'.

C. Exceptions

No legal position can be absolute. There are certainly situations when a presumption against relocation is not feasible. Therefore, a uniform statute should factor in two critical situations when a default provision against relocation is not in anyone's best interests. First, in situations where a non-custodial or joint-custodial parent is not exercising the rights they have under the current agreement, a default provision against relocation creates an unfair burden on the custodial parent. Second, in cases of domestic violence or child endangerment, a default position against relocation can be extremely harmful.

There are certainly situations when a non-custodial parent or a joint-custodial parent fails to exercise their parenting rights under a current agreement. In these cases, it is unfair for a negligent parent to prevent the child and the other parent from moving to a new location. The focus remains on the child's issues being paramount. In this particular situation, a child's right of access to both parents is not being denied by the court system, but it is being denied by the parent itself. In situations like these, the child's interests are best served by not forcing the child to stay in a location near an uninvolved and negligent parent. This author recommends language that excepts situations where a parent has not been exercising his or her parental rights under the current parenting plan for the six months prior to the request for relocation as long as the failure to exercise those rights is not because of the other parent's interference with the exercise of those

¹³¹ Debele, *supra* note 127. For a discussion of a parent's constitutional right to travel as it relates to child custody, see Kimberly K. Holtz, *Move Away Custody Disputes: The Implications of Case-by-Case Analysis and the Need for Legislation*, 35 SANTA CLARA L. REV. 319, 356-58 (1994); Blair W. Hoffman, *Restriction on a Parent's Right to Travel in Child Custody Cases: Possible Constitutional Questions*, 6 U.C. DAVIS L. REV. 181, 186 (1973); Paula M. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625 (1985).

rights. The burden would be on the parent who wishes to relocate to show that the non-relocating parent has not exercised their rights under the current parenting plan for the last six months through no fault of the relocating parent.

The second exception is more serious. In cases of domestic violence and child endangerment, it makes absolutely no sense to require a parent and child to remain near their abusers. Many current relocation statutes have such an exception.¹³² This author recommends language that excepts situations where the non-relocating parent has been found to have committed domestic violence, child abuse, or child endangerment. Again, as in the other exception, the burden would remain with the relocating parent to show that the non-relocating parent has committed domestic violence, child abuse, or child endangerment.

CONCLUSION

For children like Amanda, the prospect of a parent relocating can be overwhelming. Amanda was confronted with being taken away from a stable life that included seeing both parents on a regular basis. She was confronted with no good choices. Either stay in Texas with her father and miss out on time with her mother, step-father, and half-sister, or go to Washington and lose her relationship with her dad. This is no position to be in for a child whose life has already been fragmented by the breakdown of their parent's relationship. It only causes stress, anxiety, and trauma. The proposed uniform law is unlike any other statute in that it requires pre-emptive agreements at the time of the original custody order and requires that parents make every effort to come to a suitable agreement in the event of a future relocation. More importantly, the proposed uniform law is unlike any other statute in that employs a default provision against relocation in the event that the parties cannot agree on a more suitable

¹³² See, e.g., ALA. CODE §30-3-169.4 (LexisNexis Supp. 2007); OR. REV. STAT. ANN. § 107.159 (West 2007).

arrangement. There are no presumptions, no burdens, and no judicially determined best interest analysis. Its message is simple: your children's stability and continuity in their relationships with both parents are more important than your own interests.

The proposed uniform provisions effectively remove the prospect of re-litigating custody, except in cases of domestic violence or when a parent has neglected their parenting responsibilities under the current plan. By requiring agreements at the time of the original custody order as well as mandating alternative dispute resolution as a last ditch effort to reach an agreement, the chances of re-litigating are greatly reduced. The chances are reduced even more by employing a default provision rather than employ a burden system, presumption system, or best interest system.

The proposed provisions reasonably ensure that the emotional trauma to children will be minimized. By requiring agreements and directing parents to utilize alternative dispute resolution methods, the chances that their children are going to be re-victimized in the court process during a second round of fighting is much less. By erring on the side of caution and maintaining the child's relationship with both parents, we are not playing the odds that a child's emotional well-being will not be adversely affected by a relocation.

With a default provision against relocation, the child's interests remain paramount to the interests of the parents. It emphasizes that the parents take responsibility for their decisions and put their child's interests first, rather than their own. Requiring that parents reach an agreement about relocation at the time of the original custody order means that when the parents are establishing custody, they understand that their interests are secondary. They are put on notice that their future choices may be limited. They need to come up with a plan for how to deal with any future changes while maintaining continuity and stability for their children. This proactive

approach puts the child's interests first and keeps them there.