

Rush to Relocate: Are Presumptions In Favor of Relocating Parents Really in the Children's Best Interests?

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Whether a parent should be permitted to relocate with a child over the other parent's objections poses a dilemma that has historically vexed the family court system. Inevitably, one parent will feel as if he/she lost, either because a desired move is prevented or because close and frequent access to a child is precluded. Due to changes in societal and family structures including the increased divorce rate, increased out-of-wedlock births, a rise in women's employment and college attendance, increasing attempts by non-custodial fathers to play a greater role in their children's lives, and the overall increased mobility of American society, relocation promises to be a significant issue facing courts for the foreseeable future.¹ Therefore, it is imperative to develop a legal standard that adequately addresses the myriad factors and motivations driving relocation, and its potential effects on parents and children.

In response to the increase in frequency and complexity of relocation disputes, courts and scholars have attempted to define the proper standards to apply in these cases. Despite these efforts, nothing even approaching uniformity has been achieved.² The states have developed their own idiosyncratic laws through a patchwork of presumptions, burdens, factors, and public policy concerns, though there is a clear trend among the states in favor of a relocating custodial parent.³

The literature and research on the effects of relocation and frequent non-custodial parent contact on children has also failed to achieve consensus, as recognized by numerous authors.⁴ The American Academy of Matrimonial Lawyers, in drafting its Model Relocation Act, also failed to agree on the appropriate allocation of the burden of proof, and instead offered three options for states to choose.⁵ It is clear that neither law nor social science currently

offer a definitive and widely-accepted solution to relocation disputes.

In this article, I will define the dispute surrounding the relocation controversy by reference to opposing schools of thought on the relative importance of the custodial and non-custodial parents' relationship with a child, and the effect each position has on relocation analysis. After a summary of the various state approaches to the relocation issue, I will discuss two major theories governing relocation matters. First, I will analyze the importance of the primary custodial parent/child bond as a justification for presumptions granting the custodial parent wide latitude to make relocation decisions. Next, I will examine the benefit to children by remaining in close contact with the non-custodial parent as a basis for restricting the custodial parent's attempts to relocate. My purpose is not necessarily to accept one body of research over the other. Rather, I will demonstrate that, since the state of commentary and social science research on relocation issues is far from clear, and in some cases directly contradictory, a presumption in favor of a custodial parent's relocation decision rests on questionable grounds. Since the current state of knowledge on this subject does not clearly support one view over the other, a presumption in these cases is inappropriate. Presumptions in favor of the custodial parent should be removed from the laws in states such as Arkansas, Wyoming, Minnesota, and Wisconsin, with each case being decided based on its particular facts and circumstances.

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STATE APPROACHES TO RELOCATION

State efforts to address relocation generally fall into three very broad categories,⁶ though the national trend in relocation cases is in favor of the custodial parent's ability to relocate with the child.⁷ First, some states employ a presumption in favor of the custodial parent's flexibility to make life choices for himself/herself and the child, and in recognition of the primary custodial parent/child attachment. For example, in *Blivin v. Weber*, the Arkansas Supreme Court held that a non-custodial father with substantial physical placement was required to rebut a presumption in favor of the custodial mother's relocation, even in absence of any real advantage resulting from the move.⁸ Other courts have reached similar conclusions. See, e.g., *Watt v. Watt*, 971 P.2d 608, 614 (Wy. 1999)(relocation is not sufficient, by itself, to establish a change in circumstances and overcome the presumption in favor of continued primary placement with the custodial parent); *Auge v. Auge*, 334 N.W.2d 393, 398 (Minn. 1983)(issues of custodial autonomy, *res judicata*, and primary parent/child stability demand that courts may not prohibit custodial parent's relocation absent showing by preponderance of the evidence that the move is not in the child's best interest). Some states have enshrined presumptions in favor of the relocating parent in their legislative codes.⁹

Second, a minority of states take the opposite approach in employing a presumption against relocation. This view recognizes the importance of the non-custodial parent/child relationship and attempts to maximize the child's time with both parents.¹⁰ For example, the Alabama Code states that there shall be a rebuttable presumption that a change of principal residence of a child is not in the best interest of the child. Ala. Code 30-3-169.4. Applying this statute, the Court of Civil Appeals in *Toler v. Toler*, ___ So. 2d ___ (Ala. Civ. App. 2006) held that the mother's burden was not met when the father exercised daily placement, mother had interfered with visitation, and the child had developed positive, stable relationships by virtue of his long-term residence in the home community.¹¹

Rather than invoke a presumption, some states place the burden of proof of the child's best interests on one parent.¹² These burdens in many ways act in the same way as presumptions,¹³ often by placing a heavy burden on the non-custodial parent to demonstrate that relocation is particularly harmful to the child's well-being. The amorphous distinction between presumptions and burdens is clear in *Russenberger v. Russenberger*, 669 So. 2d

1044, 1046, n.6 (Fla. 1996), in which the Florida Supreme Court adopted a burden-based test for establishing what is admittedly a presumption in favor of the custodial parent. Other states require the non-custodial parent to show the custodial parent's vindictive purpose,¹⁴ or necessity of a change in custody.¹⁵ Even if the burden is placed on the custodial parent, it is typically set very low.¹⁶ Since a certain amount of difficulty and disruption is presumed in all relocations, courts often require proof of serious detriment to the child before they will prevent a move. For example, the Court of Appeals of Iowa has held that a prohibition on relocation is improper simply because the move is traumatic for the child.¹⁷ Burdens on the non-custodial parent are often set so high that they are rarely, if ever, met.¹⁸

Third, some states employ a neutral model without applying presumptions or burdens, but instead requiring the court to decide relocation disputes on a case by case basis.¹⁹ This approach ensures that each case is decided on its specific facts and circumstances, and involves detailed, and admittedly time-consuming, fact finding. As the New Mexico Supreme Court stated in *Jaramillo v. Jaramillo*: [A]llocating burdens and presumptions . . . does violence to *both* parents' rights, jeopardizes the true goal of determining what in fact is in the child's best interests, and substitutes procedural formalism for the admittedly difficult task of determining, on the facts, how best to accommodate the interests of all parties. . . .²⁰ The Colorado Supreme Court, extensively quoting *Jaramillo*, recently adopted this neutral model as applied to its own relocation statute.²¹

Some states combine the above approaches into a two-tier analysis, depending on the amount of placement time the relocating parent enjoys. For example, in Wisconsin, if the relocating parent has placement for the greater period of time, the move is presumptively in the child's best interests; if the parents enjoy substantially equal placement, no presumption applies. Wis. Stat. ' 767.481. By focusing on the amount of placement time, subsection (3)(a) makes that parent with greater placement analogous to the custodial parent referenced in most statutes and literature, and applies a presumption in favor of relocation.²² Tennessee employs a similar model, granting a presumption in favor of relocation to a parent with the greater amount of placement time, but withdrawing the presumption in cases of substantially equal placement. Tenn. Code Ann ' 36-6-108. Tennessee's relocation statute is far more detailed than Wisconsin's in that it applies different factors based on whether a presumption exists, and exhaustively defines what constitutes

harm to a child for purposes of defeating a relocation attempt. Tenn. Code Ann. ' 36-6-108(c)-(e). The statutory definition of specific and serious harm includes inadequate medical and educational facilities, the presence of domestic violence or substance abuse, the custodial parent's emotional instability, relocation to a foreign country that does not protect non-custodial parents' rights and, interestingly, emotional harm resulting from lack of contact with a non-custodial parent on whom the child relies for emotional support, nurturing and development. Tenn. Code Ann. ' 36-6-108(d). If the presumption is rebutted, the court then applies the same factors as in the case of equal placement. Tenn. Code Ann. ' 36-6-108(e).

SOCIAL SCIENCE RESEARCH/LITERATURE

The varied state approaches to relocation cases derive at least partly from the available social science research of the effects on children of post-divorce relocation and custodial/non-custodial parent contact. It is undisputed that children's post-divorce adjustment is best served by maintaining a positive relationship with both parents.²³ Less parental conflict results in better parent-child relationships and less adjustment problems.²⁴ However, the optimal level of post-divorce contact between a child and non-custodial parent is unclear. One view holds that non-custodial parents have little or no impact on a child's positive adjustment and can even be detrimental.²⁵ [N]either increased duration nor frequency of visits has a measurable favorable effect on the child's emotional well-being . . . A negative correlation has, however, been clearly established.²⁶ On the other hand, a separate body of research has found that frequent contact between the child and non-custodial parent is a positive factor in the child's well-being.²⁷ Relocation away from the non-custodial parent usually results in less contact and involvement in the child's life.²⁸ However, frequent and consistent contact with non-custodial parents has often been found to result in greater adjustment in regards to self-esteem, academic performance, and behavior.²⁹ Other studies have found that too-infrequent contact with a non-custodial parent can be detrimental to the child's well-being because a vacation or Disneyland parent does not have the same opportunities for involvement in the child's life,³⁰ particularly with routine bonding activities such as assisting with homework, attending and supporting extracurricular activities,

or simply resolving daily social or school issues. Similarly, the effect of moves on children of both divorced and intact families has been characterized as generally deleterious.³¹ Braver, Ellman & Fabricius' study also demonstrated a preponderance of negative effects resulting from one parent's relocation away from the other parent, including less financial support, hostility, stress, negative parental perceptions, and physical and emotional health.³²

Stability and consistency are almost universally recognized as important factors in children's positive post-divorce adjustment.³³ Stability, however, is an inherently loaded term and can be legitimately cited by both sides of the debate as a persuasive justification. The malleability of this term has been recognized by numerous sources.³⁴ In one view, stability is best achieved by permitting the custodial parent and child to relocate, thus maintaining the child's bond with the primary care parent. Stability is readily understood to mean stability within the household, not stability of geographic location.³⁵ If the household is defined as the new family unit of custodial parent and child, then stability is clearly furthered by permitting relocation to keep that relationship intact. The non-custodial parent is thus treated as any other nonhousehold member.³⁶

On the other hand, relocation removes the child from his familiar surroundings, breaking bonds with family, friends, and other community relationships.³⁷ These relationships could otherwise assist in coping with the divorce, so their loss could be particularly difficult.³⁸ At the same time as the child loses familiar bonds, he is required to acclimate himself to the new situation, which may not be as comfortable or appropriate.³⁹ Since it is recognized that children do best when changes in their post-divorce lives are kept to a minimum, these significant upheavals in their routines, coupled with the stress of the divorce itself, can have negative consequences.⁴⁰

Dr. Judith Wallerstein argues that, because post-divorce relocation is becoming more common, a child's community and support network is not a legitimate source of stability. According to Dr. Wallerstein, forcing parents to remain in the same place threatens the child's stability by weakening the primary bond with the custodial parent.⁴¹ However, this view assumes that a relocation will benefit the child, and dismisses whatever family, friends and community structures the child has enjoyed, regardless of their strength or duration. No reason is given for this disregard of existing stable support networks. Further, research indicates that the majority of parents do not relocate

post-divorce.⁴² It may be more logical, given the focus on avoiding further disruption to the child, to encourage existing support structures to ease the child through the divorce process.

DOMINANCE OF THE CUSTODIAL PARENT/ CHILD RELATIONSHIP

The preference for the custodial parent is best exemplified by the work of Dr. Judith Wallerstein. Dr. Wallerstein submitted an extremely influential *amicus curiae* brief in the *Burgess* case that helped form the basis for that court's opinion establishing a presumption in favor of the custodial parent's relocation with the child.⁴³ In *Burgess*, a mother with joint legal and primary physical custody sought to relocate to a new community with the two children, citing better job opportunity and better medical care and education for the children. The father objected and sought primary placement, claiming that the greater distance would interfere with his placement schedule. The California Supreme Court found that under California statute ' 7501, the mother had a presumptive right to determine the children's residence, and that the father had not shown that the proposed relocation would be detrimental to the children, sufficient to overcome that presumption.⁴⁴ The Court reasoned that prohibiting a custodial parent's relocation would interfere with the primary parent/child relationship and inappropriately inject the courts into that parent's family decisionmaking.

Both *Burgess* and Dr. Wallerstein's brief have since been widely cited to support custodial parents' relocation attempts. In essence, Dr. Wallerstein argued that the most important factor in a child's post-divorce adjustment is a strong relationship with the custodial parent.⁴⁵ This relationship provides the primary source of stability in the child's post-divorce life.⁴⁶ Additionally, since the custodial parent has primary responsibility for the child's care and needs, that parent should be permitted wide latitude in determining the best method of providing for those needs.⁴⁷ The non-custodial parent may play an important role in the child's life, but the bond with that parent is still considered secondary.⁴⁸ Absent extremely limited circumstances, the custodial parent should be permitted to relocate with the child in order to keep that primary bond intact.⁴⁹ If the custodial parent believes that relocation is in the child's interest, that decision should be presumed correct. Thus, a presumption in favor of the move is appropriate.⁵⁰

This view is based on the concept that, post-divorce, a new family unit, consisting of the custodial parent and child, has taken the place of the previous traditional unit.⁵¹ The non-custodial parent is not a part of this new family.⁵² In this sense, state interference, even under a best interest standard, is unwarranted. Since the state generally does not interfere in traditional family decisions, interference in this new family's relocation decision is also unwarranted.⁵³

From this perspective, the interests of the child are presumed aligned with the happiness and well-being of the custodial parent.⁵⁴ Simply stated, what is good for the custodial parent is good for the child.⁵⁵ It is not always necessary that the custodial parent show that the move is in the child's best interests.⁵⁶ The custodial parent has thus been able to justify relocating with the child for varied reasons that seem mainly to involve the parent's interests. Courts have permitted relocation for the following reasons: a custodial parent's desire to be closer to family, employment or educational opportunities, remarriage, and a new spouse's job opportunity, among others.⁵⁷ In these cases, the custodial parent is the direct beneficiary of the relocation; the benefit to the child is indirect, at best.

Alignment of Interests

This approach is predicated on the notion that, because the interests of the custodial parent and child are presumed to be aligned, any detriment to the custodial parent if the move is prevented is also imputed to the child. If the custodial parent is denied relocation to meet his/her needs, he/she may suffer negative emotional and financial difficulties that will negatively impact the child,⁵⁸ such as depression, financial constraints, resentment of the child, and overall diminished parenting.⁵⁹ The child may also experience guilt since he/she was the cause of the custodial parent's difficulties.⁶⁰ The Pennsylvania Supreme Court has stated that [the custodial parent's] ability to be an effective parent to her children is seriously undermined by the difficulty and unhappiness of her life in Pennsylvania. Conversely, there is no question that the move . . . is likely substantially to promote the well-being of the mother and, consequently make her a more effective, superior parent. We think it is fundamental that the best interests of the children cannot . . . be severed from the interests of the mother with whom they live and upon whose mental well-being they primarily depend.⁶¹

Therefore, under this approach, the purpose for the move is irrelevant, and no restrictions should be placed on the custodial parent's decision. The law should allow the custodial parent to move . . . whenever she decides to move and for whatever reason. Courts should exercise discretion only in adjusting the noncustodial parent's visitation schedule.⁶² Some commentators take the position that the non-custodial parent need not even be notified prior to the custodial parent's relocation with the child.⁶³

Some courts will deny the relocation if it is done out of spite or anger towards the non-custodial parent, particularly if the purpose is solely to interfere with the non-custodial parent's relationship with the child. However, some commentators claim that even this limited action represents an unwarranted intrusion by the court and non-custodial parent on the custodial parent. According to Bulow & Gelman, [e]ven when it can be clearly established that the only reason for the move is the custodial parent's hostility towards the ex-spouse, relocation should be permitted.⁶⁴

This situation places the non-custodial parent at the virtual mercy of the custodial parent. Taken further, non-custodial placement may be based entirely on the whim of the custodian.⁶⁵ The non-custodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits.⁶⁶ This view has not received wide acceptance.⁶⁷ The non-custodial parent would thus be forced to move to modify custody in order to have any standing to object to the relocation.

An Interesting Example

The dialogue between Wisconsin's courts and legislature provides an interesting example of the complexities inherent in relocation disputes. In *Kirkoliet v. Kirkoliet*, the Wisconsin Court of Appeals determined that, although presumptive relocation imposed a heavy burden and harsh result on the non-custodial parent, that parent should be permitted to relocate despite the lack of legitimate reasons, and regardless of the involvement of the non-custodial parent.⁶⁸ The parents in this case shared joint custody and placement of their four children. Ms. Kerkvliet was awarded primary placement, though Mr. Kerkvliet enjoyed a good relationship with his children and maintained daily contact with them.⁶⁹

Six years post-divorce, Ms. Kerkvliet petitioned to relocate with the children from Wisconsin to

Florida for reasons including the racial composition of the school system, the community's value system and lifestyle, Florida's landscape and weather, the welcoming nature of Florida's residents, and a different situation. Although the Court characterized these reasons as feeble and insensitive, and found that Mr. Kerkvliet was a model non-custodial parent,⁷⁰ it held that a non-custodial parent's only recourse was to modify custody and placement.⁷¹ Because Ms. Kerkvliet was an effective parent and was the children's primary caretaker, it was not in the children's best interests to grant legal custody and primary placement to Mr. Kerkvliet.⁷² The Court thus accepted the view that custodial parents should be granted extremely wide latitude in relocation decisions.

The Wisconsin legislature responded swiftly with the enactment of Wis. Stat. ' 767.481, which limits *Kerkoliet* significantly. It permits the non-custodial parent to move to prohibit the relocation, and allows the court to consider whether the move is in the child's best interest.⁷³ *Kerkoliet* has also been limited by *Hughes v. Hughes*, which held that where the only potential substantial change in circumstance is the proposed move; ' 767.451-the statute governing revisions of custody/placement applies when the moving party asserts that circumstances other than those associated with a proposed move have changed.⁷⁴ Therefore, the non-custodial parent may move for a revision of custody/placement under ' 767.451 for separate reasons unrelated to the move, potentially avoiding the presumption.

IMPORTANCE OF THE NONCUSTODIAL PARENT/CHILD RELATIONSHIP

The supposed dominance of the custodial parent/child relationship has been criticized as resting on questionable or mischaracterized social science research, gender bias, and exclusion or minimization of the non-custodial parent.⁷⁵ Focus on the custodial parent/child relationship diminishes the benefits of non-custodial parent involvement when, in fact, a significant body of research has found that the non-custodial parent/child relationship carries important benefits. Indeed, as noted by Dr. Richard Warshak, Wallerstein's earlier findings, as well as other oft-cited studies, unequivocally noted the importance of non-custodial parents, particularly fathers, in children's adjustment.⁷⁶ Additionally, Warshak claims that Wallerstein's research ignores numerous studies indicating the importance of regular placement with non-custodial parents.⁷⁷

Braver, Ellman and Fabricius also find it troubling that much indirect and controversial research has played a significant role in the trend towards permitting moves by custodial parents.⁷⁸

Limited or infrequent contact with non-custodial parents has important implications for both children and parents. Non-custodial parents who cannot see their children regularly are prevented from taking part in daily activities that build strong bonds, including supervision of homework, discipline, conflict resolution, familiarity with children's friends, and all manner of relatively minor day-to-day activities.⁷⁹ This limited interaction negatively impacts the depth and richness of the parent/child relationship.⁸⁰ If the post-divorce family structure is limited to the custodial parent and child, the non-custodial parent is relegated to the status of a visitor or stranger. This simply perpetuates the "Disneyland Dad" syndrome, which Warshak and others argue does not permit maintenance and growth of strong bonds between parent and child.⁸¹ The exclusion of the non-custodial parent from the family unit contradicts the ample body of research indicating the importance of relationships with both parents.⁸²

Further, failure to maintain a close relationship with the child may lead to withdrawal by a non-custodial parent, thus increasing the custodial parent's burden.⁸³ Such withdrawal, in addition to weakening the parent/child relationship, may also have negative financial consequences, since less involvement seems to be correlated with a decrease in financial support.⁸⁴ A review of the research indicates that sole custody families suffer from increased abuse, stress, economic instability, poor parental adjustment, and increased litigation.⁸⁵ If one parent moves away with the child, that parent becomes in essence, a single parent. Since limited help is available to the custodial parent, the stresses of parenthood fall disproportionately on that parent.⁸⁶ It thus seems logical that stress, financial constraints, and general parenting difficulty would increase, which appears to be confirmed by the research.⁸⁷ Instead of easing the burden on a custodial parent, relocation may have the opposite effect.

If relocation and infrequent non-custodial placement may negatively affect the child and parent, an assumption that the custodian's and child's interests are aligned may not be appropriate. Such an assumption fails to consider the potential divergence of interests between the child and custodian. For example, the benefits of the move may not be realized, the child may miss the parent left behind, the child's bond with that parent may weaken, the child may wish to remain close

to friends, and may experience reluctance and difficulty with traveling.⁸⁸ Warshak also noted a significant body of research suggesting that frequent relocation was correlated with academic, economic, and behavioral problems.⁸⁹ "[C]ourts would be mistaken to assume . . . that children benefit from moving with their custodial parent *whenever* the custodial parent wishes to make the move . . . [T]here is no empirical basis on which to justify a legal presumption that a move by the custodial parent to a destination she plausibly believes will improve her life will necessarily confer benefits on the child she takes with her."⁹⁰ Although Wallerstein states that children's wishes should be considered, an assumption in favor of relocation does not adequately account for the possibility that the child's and parent's interests may not perfectly align. Indeed, numerous studies demonstrate that children desired more contact with the non-custodial parent.⁹¹ If children's wishes are truly to be considered, it is difficult to see how these findings can be ignored.

Intangible Factors

Social science research may also have difficulty measuring "intangible" factors, as well as accounting for the wide range of family dynamics. For example, it may be difficult for social science to definitively determine the impact on the child of missing a parent or of a parent not sharing the child's first recital or not knowing the child's best friend.⁹² Also, factors such as culture, socioeconomic circumstances, children's age, parental stress, and pre-existing psychological issues, among others, can all have an effect on the relationship dynamic in the post-divorce family.⁹³ Additionally, studies that rely on self-reporting by custodial parents (usually mothers) may not account for potential bias.⁹⁴ Numerous studies demonstrate that a significant amount of custodial parents admit to interfering with the non-custodial parent's relationship with the child and see no value in that relationship.⁹⁵ Failure to account for these factors may skew the results in favor of the custodial parent.

Gender bias may also play a role in research findings since, in the majority of post-divorce custody arrangements, the mother is the custodial parent.⁹⁶ Therefore, most social science research has focused on the father as the non-custodial parent.⁹⁷ Focusing on the mother/child relationship risks devaluing the father/child relationship. However, as stated above, a significant body of research indicates that fathers play an important role in their children's

well-being. Further, research indicates an increase in joint custody and greater father/child involvement, such that presumptions of the mother as primary parent may not be as justified as they once may have been.⁹⁸

THE CUTOFF POINT

An additional problem raised by the custodial/non-custodial distinction is the cutoff point where a parent becomes "custodial" for purposes of the presumption.⁹⁹ Is a parent "custodial" if he/she does 50 percent of the care? 60 percent? 75 percent? The ALI Principles suggest that a "simple majority of 51 percent should not be enough to trigger [the presumption]. A percentage between 60 and 70 percent falls within a reasonable threshold range."¹⁰⁰ Wallerstein herself recognizes that the "custodial" parent is not always the parent primarily responsible for the child's day-to-day care, and that the child's most significant relationship may be with the non-custodial parent.¹⁰¹ In Wisconsin, the difference between parents with a "greater period of time," who are entitled to a presumption, and those with "substantially equal placement," is unclear. Is 51 percent enough to be the "greater period of time?" In an unpublished decision, the Court of Appeals suggested that a mathematical calculation of placement can be used to identify which parent is entitled to the presumption.¹⁰² The relocating parent claimed that a 60/40 placement schedule in her favor resulted in the "greater period of time" under the statute.¹⁰³ The Court seemed to accept that a 60/40 arrangement would entitle the parent to the presumption.¹⁰⁴

Since the state of knowledge regarding non-custodial parent/child contact and the effects of relocation are less than clear, applying a presumption in favor of relocation may not be appropriate. In fact, many authors argue that the burden should be on the relocating custodial parent.¹⁰⁵ According to Braver, Ellman and Fabricius, "[f]rom the perspective of the child's interests, there may be real value in discouraging moves by custodial parents . . . in cases in which the child enjoys a good relationship with the other parent."¹⁰⁶ Rather than applying presumptions either way, many authors favor a case by case approach that is dependent on the particular circumstances of each family. According to Leben and Moriarty, "[t]here is certainly sufficient evidence in support of the importance of the contact between non-custodial parents and children to justify a careful look at the best outcome for

each case rather than a predetermined outcome."¹⁰⁷ Gindes echoes this careful, individualistic approach in being "reluctant to conclude that custodial mothers should be allowed to relocate without careful consideration of the circumstances in the particular case."¹⁰⁸ Certainly, given the wide disparity in family structures, at the very least it seems appropriate to consider each case on its particular facts and circumstances, rather than applying a blanket presumption in favor of relocation.

CONCLUSION

The above discussion is intended to highlight the disagreement in both the legal and psychosocial research communities as to the importance of each parent's relationship with a child, allocation of parental decision-making authority, and the factors affecting children's post-divorce adjustment, as applied to relocation disputes. It should be apparent that, despite the national trend in favor of permitting custodial parent/child relocation, research supporting such a trend is far from clear. In light of such significant disagreement, presumptions explicitly adopting the primary custodial parent/child dynamic as their foundation lack a sound basis in available social science data. Such presumptions inherently minimize the contributions of non-custodial parents in the face of a sizeable body of research indicating the important role these parents can play in their children's post-divorce adjustment. Additionally, presumptions apply across the board to all families, whether or not a particular family fits into the basic model. Until and unless more definitive evidence can be found, presumptions favorable to custodial parent relocations, such as that contained Wis. Stat. § 767.481(3)(a), should be removed in favor of a case by case approach that accounts for each family's individual circumstances.

NOTES

1. Charles P. Kindregan, Jr., *Family Interests in Competition: Relocation and Visitation*, 36 *Suffolk U. L. Rev.* 31, 35-6 (2002); Gary A. Debele, *A Children's rights Approach to Relocation: A Meaningful Best Interests Standard*, 15 *J. Am. Acad. Matrim. Law.* 75, 107-8 (1998).

2. Some estimates place the number of custodial mothers relocating post-divorce at 75%. Merrill Sobie, *Whatever Happened to the Best Interests Analysis in New York Relocation Cases? A Response*, 15 *Pace L. Rev.* 685, 688-9 (1995).

3. Tricia Kelly, Presumptions, Burdens and Standards, Oh My: In Re Marriage of Lamusga's Search for a Solution to Relocation Disputes, 74 U. Cin. L. Rev. 213, 217 (2005).
4. See, e.g., Kelly, *supra* at 217-8, Debele, *supra* at 76-77; Marion Gindes, Ph.D., *The Psychological Effects of Relocation for Children of Divorce*, 15 J. Amer. Acad. Matrim. Law. 119, 120 (1998); McGough, *supra* at 326-328.
5. Model Relocation Act, cmt. at 21 (American Association of Matrimonial Lawyers 1998), available at http://www.aaml.org/files/public/Journal_vol_1511_Model_Reloc_Act.pdf (hereinafter AAML Model Act).
6. Kindregan, *supra*, at 42-6.
7. Kelly, *supra*, at 217.
8. *Blivoin v. Weber*, 354 Ark. 483, 490, 126 S.W.2d 351, 356 (Ark. 2003)
9. Cal. Family Code ' 7501. This statute specifically affirms the California Supreme Court's decision in *In re Marriage of Burgess*, 13 Cal. 4th 25, 913 P.2d 473 (Cal. 1996). The *Burgess* decision is a landmark in relocation jurisprudence, and is discussed at length later in this article.
10. Kindregan, *supra*, at 42.
11. Until 2004, South Carolina also employed a presumption against relocation. *Latimer v. Farmer*, 360 S.C. 375, 380, 602 S.E.2d 32, 34 (S.C. 2004) overruled that presumption and replaced it with a best interest standard.
12. For states that place the burden on the relocating parent, see Ariz. Rev. Stat. ' 25-408(G); Mo. Rev. Stat. ' 452.377(9); La. Rev. Stat. Ann. ' 9:355.13; *Stout v. Stout*, 560 N.W.2d 903, 906 (N.D. 1997); *In re Marriage of Kutinac*, 182 Ill. App. Ct. 377, 382, 538 N.E.2d 862, 865 (1989). For states that place the burden on the objecting, non-custodial parent, see *In re Marriage of Montgomery*, 521 N.W.2d 471, 474 (Iowa Ct. App. 1994); *Lee v. Cox*, 790 P.2d 1359, 1361 (Alaska 1990).
13. See, Kindregan, *supra*, at 45-6; see also Steve Leben & Megan Moriarty, *A Kansas Approach to Custodial Parent Move-Away Cases*, 37 Washburn L. J. 497, 507 (1998).
14. *Aaby v. Strange*, 924 S.W.2d 623, 629 (Tenn. 1996).
15. *Lane v. Schenk*, 158 Vt. 489, 499, 614 A.2d 786, 792 (Vt. 1992).
16. See, e.g., La. Rev. Stat. Ann. ' 9:355.13.
17. *In re Marriage of Montgomery*, 521 N.W.2d 471, 474 (Iowa Ct. App.1994).
18. Leben & Moriarty, *supra*, at 506, n.58.
19. Kindregan, *supra* at 45-6.
20. *Jaramillo v. Jaramillo*, 113 N.M. 57, 63, 823 P.2d 299, 305 (N.M. S.Ct.1991)(emphasis in original), see also Kelly, *supra* at fn. 68
21. *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005).
22. Subsection (3)(b) echoes a general agreement among commentators that presumptions should not be applied in joint custody/equal placement situations, mainly because there is no identifiable custodial parent. Janet Leach Richards, *Resolving Relocation Issues Pursuant to the ALI Family Dissolution Principles: Are Children Better Protected?* 2001 B.Y.U. L. Rev. 1105, 1124 (2001)([There is] no basis in social science research to give preference to the relocating parent.); Janet Bulow & Steven G. Gellman, *The Judicial Role in Post-Divorce Child Relocation Controversies*, 35 Stan. L. Rev. 949, n. 10 (1983); 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. Quarterly 305, 318 (1996).
23. Wallerstein, *supra*, at 315; see also Gindes, *supra*, at 132, 135, 141 (1998); Paula M. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. Fam. L. 625, n. 13 (1985/1986).
24. Gindes, *supra*, at 136-7.
25. Bruch & Bowermaster, *supra*, at 262; see also Debele, *supra*, at 109.
26. Bruch & Bowermaster, *supra*, at 262. This final statement may be a bit misleading, since it appears to reference problems associated with frequent transfers of placement in high-conflict families, not necessarily frequent contact with a non-custodial parent in cooperative situations.
27. Leben & Moriarty, *supra*, at 518; see also Frank G. Adams, *Child Custody and Parental Relocations: Loving Your Children From a Distance*, 33 Duq. L. Rev. 143, 152 (1994).
28. Gindes, *supra* at 123, 134-135.
29. Leben & Moriarty, *supra*, at 520-1(citing numerous studies).

30. Gindes, *supra* at 135; Adams, *supra* at 158.
31. 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. Psych. 206, 210 (2003).
32. *Id.* at 214; see also Robert Pasahow, *A Critical Analysis of the First Empirical Research Study On Child Relocation*, 19 J. Am. Acad. Matrim. Law 321, 326-332 (2005)(analyzing the Braver study).
33. Gindes, *supra* at 122, 148.
34. Kelly, *supra*, at 230; see also AAML Model Relocation Act, *supra*, cmt.at 19 (The child has a compelling interest in stability, both in the stability of remaining with the custodian and with maintaining frequent contact with the noncustodial parent.); *Domingues v. Johnson*, 323 Md. 486, 501-2, 593 A.2d 1133, 1140-1(Md. 1991).
35. Bruch & Bowermaster, *supra*, at 264.
36. *Id.* at 265.
37. Richard A. Warshak, Ph.D., Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited, 34 Fam. L. Q. 83, 97 (2000); see also *Domingues*, 593 A.2d at 1141.
38. Raines, *supra* at 625.
39. *Id.*
40. *Id.*
41. Wallerstein, *supra* at 315.
42. Warshak, *supra* at 97-8.
43. This brief formed the basis for 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. Quarterly 305 (1996).
44. *Burgess*, 13 Cal. 4th at 35.
45. Wallerstein, *supra*, at 311.
46. *Id.* at 318.
47. Bruch & Bowermaster, *supra*, at 247.
48. Wallerstein, *supra* at 315-6.
49. Wallerstein, *supra* at 318.
50. The American Law Institute's model relocation act also approves of a presumption in favor of the custodial parent's relocation, provided that parent demonstrates that the relocation is for a valid purpose, pursued in good faith, and the new location is reasonable. *ALI Principles* ' 2.17(4)(a).
51. Wallerstein, *supra* at 315; see also Bulow & Gelman, *supra*, at 962-3,
52. Bulow & Gelman, *supra*, at 963.
53. *Id.*
54. Adams, *supra*, at 150; see also *Principles of the Law of Family Dissolution* ' 2.17, cmt. a (2000)(hereinafter *ALI Principles*). The *ALI Principles* set forth six permitted reasons for relocating, four of which focus on the benefit to the custodial parent. *ALI Principles* ' 2.17(4)(a)(ii).
55. *Baures v. Lewis*, 167 N.J. 91, 106, 770 A.2d 214, 223 (2001).
56. *ALI Principles* ' 2.17, cmt. a (2000).
57. Raines, *supra*, at n. 20.
58. Wallerstein, *supra*, at 315; see also Debele, *supra*, at 110.
59. Debele, *supra*, at 110.
60. *Id.*
61. *Gruber v. Gruber*, 400 Pa. Super.174, 188, 583 A.2d 434, 440-1 (Pa. Super. Ct. 1990)
62. Bulow & Gelman, *supra*, at 968, see also, Bruch & Bowermaster, *supra*, at 269.
63. Bruch & Bowermaster, *supra*, at 285, fn. 161.
64. Bulow & Gelman, *supra*, at 971.
65. Raines, *supra* at 625;
66. Bulow & Gelman, *supra* at fn. 17 (citing J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* 37-38 (1973).
67. Surace, *supra*, at fn. 8.
68. *Kerkviet v. Kerkviet*, 166 Wis. 2d 930, 945-6, 480 N.W.2d 823, 829 (1992).

69. *Id.* at 934.
70. *Id.* at 934-5
71. *Id.* at 946.
72. *Id.* at 946.
73. Wis. Stat. 767.481(3)(c)
74. *Hughes v. Hughes*, 223 Wis. 2d 111, 124, 588 N.W.2d 346, 352-3 (Ct. App. 1998).
75. *E.g.*, Peter Ted Surace, A Proposed Best Interests Test For Removing A Child From The Jurisdiction Of The Noncustodial Parent, 51 Fordham L. Rev. 489 (1982); Pasahow, *supra*, at 321; Warshak, *supra*.
76. Warshak, *supra* at 89-93.
77. Warshak, *supra* at 89-93.
78. Braver, Ellman & Fabricius, *supra*, at 209.
79. *See* Warshak, *supra*, at 93.
80. *Id.*
81. *Id.* At 85, 93-4.
82. *Id.* At 85, 89-93.
83. Raines, *supra*, at 625.
84. Warshak, *supra*, at 94.
85. Raines, *supra*, at 625.
86. Warshak, *supra*, at 99.
87. Warshak, *supra*, at 94, 99.
88. *See* Warshak, *supra*, at 99, 101-2.
89. *Id.* At 96-97.
90. Braver, Ellman & Fabricius, *supra*, at 214-5.
91. Warshak, *supra*, at 96, 106-7.
92. Gindes, *supra*, at 135-6.
93. *See generally*, Gindes, *supra*, Warshak, *supra*.
94. Warshak, *supra*, at 88.
95. Leben & Moriarty, *supra*, at 514.
96. Gindes, *supra*, p. 132.
97. Leben & Moriarty, *supra*, at n. 99.
98. Warshak, *supra*, at 86.
99. *See* Warshak, *supra*, at 100.
100. ALI Principles, cmt. d.
101. Wallerstein, *supra*, at 319.
102. *Chinnock v. Chinnock*, 183 Wis. 2d 434, 516 N.W.2d 22 (unpublished).
103. *Id.*
104. *Id.*
105. Pasahow, *supra*, at 335, Braver, Ellman & Fabricius, *supra*; McGough, *supra*, at 342; Gindes, *supra*, at 144-5.
106. Braver, Ellman & Fabricius, *supra*, at 216.
107. Leben & Moriarty, *supra*, at 540.
108. Gindes, *supra*, at 145.