

# A FLEXIBLE SOLUTION TO A KNOTTY PROBLEM: THE BEST INTERESTS OF THE CHILD STANDARD IN RELOCATION DISPUTES

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## I. INTRODUCTION

In the past two decades many United States jurisdictions have adopted statutes promoting joint legal custody, shared parental responsibility, and continuing contact with both parents following separation and divorce. However, our society has become increasingly mobile, as Americans move, on average, once every seven years.<sup>1</sup> Americans relocate for various reasons, but when parents move they expect to take their children with them.<sup>2</sup> As a result, when one parent petitions the court to relocate, the court, in evaluating and weighing the paramount interests of the child, is forced to confront the competing interests of the relocating and nonrelocating parent. This paper focuses on the dilemma courts face when the relocating parent is the custodial parent and the parent opposing relocation is the noncustodial parent.<sup>3</sup> The custodial parent seeking to relocate frequently has an interest in beginning a new life elsewhere in the United States to pursue better educational, personal, and career opportunities, whereas the noncustodial parent possesses a strong desire to maintain frequent and regular contact with his or her child.

A recent Indiana case highlights the typical dilemma courts face in resolving relocation disputes. The case, discussed be-

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1. Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases: Lessons from Relocation Law*, 40 FAM. L.Q. 281, 282 (2006).

2. *Id.*

3. The custodial parent is generally the parent awarded physical custody of a child in a divorce. The noncustodial parent is the parent without the primary custody rights of a child; particularly the parent not awarded physical custody of a child in a divorce. The noncustodial parent is typically awarded visitation with the child.

low, provides a real life context to this paper's discussion of the courts' difficult task of determining what is best for the child in light of the legitimate interests of the custodial and noncustodial parent. Further, this case demonstrates that the correct resolution in a classic relocation dispute is rarely ever clear.

Gerry and Laura Rogers resided together in Lafayette, Indiana, and were married for approximately nine years before filing for divorce in 2004. Two children were born of the marriage, one in 1996 and one in 1998. The parties' divorce decree stated that, "[t]he parties shall have the minor children. Wife shall have physical custody, and Husband shall have visitation . . . If there is a disagreement regarding education or medical care, Wife shall have the right to make the ultimate decision."<sup>4</sup> In addition, Gerry was ordered to pay child support, maintain health insurance coverage for the children, and pay for all uninsured medical expenses. The divorce was finalized on August 27, 2004.<sup>5</sup>

Following the divorce, Laura worked part-time at a community college earning approximately \$12,000 per year. Gerry maintained his position as president and owner of several businesses and earned a substantial income. Gerry exercised his parenting time regularly and continued to be active in his children's lives. He acted as a coach for their baseball and soccer teams, and would also transport the children to their numerous activities and sporting events. Moreover, during the summer and fall of 2006, the children lived with Gerry Mondays through Wednesdays, and every other weekend, while Laura visited her ailing father in Texas.<sup>6</sup>

In December of 2006, Laura filed a pro se intent to move to Texas. She had extended family in Texas, including her father who recently underwent lung surgery and would benefit from her presence.<sup>7</sup> On February 23, 2007, Gerry filed an objection to the relocation and later petitioned the trial court to order the parties to submit to a custody examination and evaluation. The custody evaluator ultimately found that a move to Texas

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4. *Rogers v. Rogers*, 876 N.E.2d 1121, 1123 (Ind. Ct. App. 2007).

5. Brief for Appellee at 2, *Rogers v. Rogers*, 876 N.E.2d 1121 (Ind. Ct. App. 2007) (No. 79A02-0708-CV-711).

6. *Rogers*, 876 N.E.2d at 1124.

7. *Id.*

would disrupt the children's routines, subject them to stressful air travel, and impair their relationship with Gerry. The evaluator thus concluded that the move would not be in the girls' best interests.<sup>8</sup> The girls' therapist, on the other hand, testified that the girls were looking forward to the move and they would be able to make the necessary adjustments required by the relocation.<sup>9</sup> In the meantime, Laura bought a house and earned a teaching certificate in Texas. As a result of her teaching qualifications, a move to Texas became a financial benefit.<sup>10</sup>

Given these facts, the court was faced with the difficult decision of whether to permit Laura, the primary custodian, to relocate with the children. Permitting Laura's relocation from Indiana to Texas would ultimately disrupt the children's bond with Gerry, the noncustodial parent. On the other hand, an order denying relocation would infringe on Laura's ability to begin a new life in the location of her choice, and, as many argue, would infringe on her constitutional right to travel.<sup>11</sup>

Accordingly, relocation cases, such as the one described above, present "some of the knottiest and most disturbing problems that our courts are called upon to resolve."<sup>12</sup> As a result, courts around the country struggle to resolve relocation disputes, often resorting to inconsistent applications of rigid thresholds and presumptions that result in mechanical, parent-oriented standards. In articulating such standards, courts attempt to weigh the conflicting interests of the custodial and noncustodial parents, with the goal of satisfying the child's best interests. However, rather than focusing on the best interests of the child as the ultimate result, courts adjudicating relocation disputes have become entrenched in the debate between the rights of the custodial parent versus the rights of the

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8. *Id.*

9. *Id.* at 1125.

10. *Id.*

11. In *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969), the Supreme Court recognized the constitutional right to travel. The Court, citing *U.S. v. Guest*, 383 U.S. 745, 757 (1969), declared that, "[t]he constitutional right to travel from one State to another occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." Therefore, many argue that, by crafting a presumption against relocation, states are infringing on the custodial parent's right to travel.

12. *Tropea v. Tropea*, 665 N.E.2d 145, 148 (N.Y. 1996).

noncustodial parent.<sup>13</sup> As a result, courts have been compelled to craft standards favoring one parent or the other, rather than standards that focus on the actual best interests of the child. In fact, the majority of states have chosen either a standard that places a presumption in favor of relocation or one that places the burden on the relocating parent to show that the move is in the child's best interest.

The current relocation standards used by the majority of the courts do not involve a paramount inquiry into the best interests of the child. Rather, the current state of relocation law involves presumptions<sup>14</sup> and thresholds based on a particular court's view of whether children function better with only a primary custodian or by maintaining a relationship with both parents. In crafting these rigid, parent-oriented standards, courts often use the research of social scientists to justify their position, a type of research the majority of legal minds are ill-equipped to evaluate for accuracy. Nevertheless, based on the principles articulated in that research, courts craft standards that give determinative weight to the parent of its choice. As a result, the courts' ultimate decision of whether relocation is in the best interests of the child is based on the primary determination of which parents' interests should be given the most weight. This, in effect, has produced inconsistent results based not on the specific facts of a case, but on whether a particular jurisdiction applies a standard that favors one parent's interests over the other.

In an attempt to prevent mechanical, parent-oriented standards, and to encourage an approach that centers on what is best for an individual child, this paper proposes a model best interest of the child standard to be followed by the courts when faced with the adjudication of relocation disputes. First, however, this paper discusses the conflicting standards used by courts and legislatures in the resolution of relocation dis-

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13. In the overwhelming majority of cases, the noncustodial parent is the father and the custodial parent is the mother. Accordingly, the debate among courts and scholars is often characterized as father's rights versus mother's rights. See Judith Wallerstein & Tony Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 312 (1996).

14. "[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." FED. R. EVID. 301.

putes in the United States, including: (1) standards that give determinative weight to the custodial parent's interests; (2) standards that favor the noncustodial parent's interests; and (3) a standard based on the amount of time a parent spends with his or her child. This paper will ultimately argue that the above standards are inappropriately parent-oriented and, in turn, lack the necessary flexibility needed to ascertain the best interest of an individual child. Therefore, this paper argues that the most appropriate standard for resolving relocation disputes is a model best interest of the child analysis that lacks thresholds, presumptions, or unequal burdens, and that includes mandatory factors to guide both the courts and the parties.

## II. DISCUSSION OF THE CURRENT RELOCATION STANDARDS

### A. *Standards Favoring the Custodial Parent*

Courts employ various standards favoring the custodial parent in relocation disputes. Some courts have explicitly stated that they are employing a presumption in favor of the custodial parent's proposed relocation, while others have crafted standards that implicitly favor the interests of the custodial parent. For example, some courts have indirectly created a standard favoring the custodial parent by implementing a shifting burden scheme or by applying a standard that requires the noncustodial parent to prove that relocation warrants a modification of a prior custody award. In implementing standards that, both explicitly and implicitly, favor the custodial parent's decision to relocate, many courts have turned to social science research for support. This section will first explain the type of standards that favor the custodial parent and the research on which courts rely when implementing such standards. It will then analyze why such a standard is inappropriate in relocation cases.

#### 1. *The Standard Explicitly Favoring the Custodial Parent*

The state of California was one of the first jurisdictions to introduce a standard with a clear presumption in favor of re-

location.<sup>15</sup> In California, the noncustodial parent has the burden of proving that relocation is not in the best interests of the child.<sup>16</sup> In *In re Marriage of Burgess*, the California Supreme Court refused to interpret section 3020 of the California Family Code to require that the relocating parent bear the burden of establishing that the move is “necessary.”<sup>17</sup> Instead, the Court found that “[i]t has long been established that, under [section 7501 of the California Family Code],<sup>18</sup> the ‘general rule [is that] a parent having child custody is entitled to change residence unless the move is detrimental to the child.’”<sup>19</sup> In dicta, the court stated that a move would only be detrimental to a child when a custodial parent’s motivation is to frustrate the non-

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15. See *Burgess v. Burgess*, 913 P.2d 473, 479 (Cal. 1996). Other jurisdictions have also implemented a standard that favors the relocating parent. See, e.g., OKLA. STAT. ANN. tit. 10, § 19 (West 2007) (“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.”); WASH. REV. CODE ANN. § 26.09.520 (West 2005) (“There is a rebuttable presumption that the intended relocation of the child will be permitted.”); WIS. STAT. ANN. § 767.481(3) (West 2001 & Supp. 2008) (“There is a rebuttable presumption that 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. . . . [and] may be overcome by a showing that the move or removal is unreasonable and not in the best interest of the child.”); *Hayes v. Hayes*, 922 P.2d 896, 899 (Alaska 1996) (holding that remaining in the custody of the relocating parent is in the child’s best interest, as “[m]ost states permit custodial parents to move out of state with their children if there is a legitimate reason for the move” (citing *House v. House*, 779 P.2d 1204, 1208 (Alaska 1989))); *Hollandsworth v. Knyzewski*, 109 S.W.3d 653, 659 (Ark. 2003) (“[T]he close link between the best interests of the custodial parent and the best interest of the child. . . . [justifies] a presumption that the custodial parent’s choice to move with the children should generally be allowed.”); *Kaiser v. Kaiser*, 23 P.3d 278, 282-283 (Okla. 2001) (interpreting title 10, section 19 of the Oklahoma Statutes to mean that in the absence of a showing of prejudice to the rights or welfare of a child, a custodial parent has a statutory presumptive right to change his or her child’s residence); *Watt v. Watt*, 971 P.2d 608, 614 (Wyo. 1999) (finding that precedent establishes “a strong presumption in favor of the right of a custodial parent to relocate with her children,” and that “a relocation by a custodial parent, where the motivation for the relocation is legitimate, sincere, in good faith, and still permits reasonable visitation by the non-custodial parent, is not a substantial and material change in circumstances” (citing *Love v. Love*, 851 P.2d 1283, 1288-1289 (Wyo. 1993))).

16. See *Burgess*, 913 P.2d at 479.

17. CAL. FAM. CODE § 3020 (West 2004) (providing that the public policy of the state of California requires that “minor children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage”); *Burgess*, 913 P.2d at 480 (reading section 3020 to only promote the policy of “encourag[ing] parents to share the rights and responsibilities of child rearing”).

18. CAL. FAM. CODE § 7501 (West 1996), amended by 2003 Cal. Stat. 156 (“A parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child.”).

19. *Burgess*, 913 P.2d at 480 (citing *In re Marriage of Ciganovich*, 132 Cal. Rptr. 261, 264 (Cal. Ct. App. 1976)); *Forslund v. Forslund*, 37 Cal. Rptr. 489, 494 (Cal. Ct. App. 1964)).

custodial parent's contact with the child.<sup>20</sup>

Therefore, in California, so long as the custodial parent proves that he or she has some legitimate, good faith purpose for moving, the relocation will be permitted. The court, in support of its' holding in *Burgess*, reasoned that we live in "an increasingly mobile society [and] . . . it is unrealistic to assume that divorced parents will permanently remain in the same location after dissolution or to exert pressure on them to do so."<sup>21</sup> The court further determined that the judiciary should refrain from attempting to "micromanage" the family by "second-guessing reasons for everyday decisions about career and family."<sup>22</sup> Recently, the California legislature codified the court's decision in *Burgess* by amending section 7501 of the California Family Code to add subdivision (b), which reads: "It is the intent of the Legislature to affirm the decision in *In re Marriage of Burgess* . . . and to declare that ruling to be the public policy and law of this state."<sup>23</sup>

## 2. *The Shifting Burden Standard*

Another standard that favors the custodial parent, the shifting burden test, has been implemented by the Indiana legislature in section 31-17-2.2-5 of the Indiana Code:

(c) The relocating individual has the burden of proof that the proposed relocation is made in good faith and for a legitimate reason; (d) If the relocating individual meets the burden of proof under subsection (c), the burden shifts to the nonrelocating parent to show that the proposed relocation is not in the best interest of the child.<sup>24</sup>

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20. *Burgess*, 913 P.2d at 481 n.6.

21. *Id.* at 480-81; *see also* Wallerstein & Tanke, *supra* note 13, at 310 ("It is unrealistic to expect that any family in contemporary American society . . . will remain in one geographic location for an extended period of time, or that only one parent will wish to move.").

22. *Burgess*, 913 P.2d at 481; *see also* Wallerstein & Tanke, *supra* note 13, at 307 (stating that "the effects of court intervention on children and parents show that judicial proceedings and court orders can have powerful, unintended effects").

23. *See* CAL. FAM. CODE § 7501 (West 1996), *amended by* 2003 Cal. Stat. 156; *see also* Lamusga v Lamusga, 88 P.3d 81, 92 (Cal. 2004).

24. IND. CODE ANN § 31-17-2.2-5 (West 2008). There are two ways to object to a proposed relocation under the relocation chapter: (1) a motion to prevent relocation, which involves the shifting burden analysis discussed above; and (2) a motion to modify custody, which a court may do if it finds "appropriate." *See* IND. CODE ANN § 31-17-2.2-1(b) (West 2008); *see also* Bax-

Although not explicitly, such a test is inherently beneficial to the relocating party. Under this standard, the relocating party need only prove that her proposed move is in good faith, and that she has a genuine reason for desiring to relocate. Because the custodial parent in no way has to prove that the move is in the child's best interests, the Indiana legislature, like California, implicitly placed a presumption in favor of relocation.<sup>25</sup>

The primary consideration in the shifting burden analysis employed by the Indiana legislature is not the best interests of the child.<sup>26</sup> Rather, the paramount inquiry is the legitimacy of the interests of the custodial parent. Therefore, as long as the custodial parent's interests in relocating are found to be legitimate, the relocation is presumed to be in the child's best interests, unless the noncustodial parent proves otherwise. As a result, if the relocating parent is able to show some benefit stemming from relocation, such as family support, financial gain, or employment opportunities, that parent is free to move under a shifting burden standard.<sup>27</sup> Such an analysis is almost identical to California's explicit presumption in favor of the custodial parent's relocation.<sup>28</sup>

### 3. *Relocation as a Substantial Change in Circumstances*

Various states grant a presumption in favor of relocation by holding that a noncustodial parent can only prevent a custodial parent's relocation by being named the custodial parent,

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endale v. Raich, 878 N.E.2d 1252 (Ind. 2008) (finding that evidence of a parent's drug or alcohol use can be relevant to that parent's health and to the child's best interests, when determining child custody and granting modification of custody in favor of the nonrelocating parent).

25. See *Rogers v. Rogers*, 876 N.E.2d 1121, 1125 (Ind. Ct. App. 2007) (affirming the trial court's finding that "[p]erhaps the most important factor is the stability of continued custody with the [custodial] parent," and holding that, because stability will be promoted by the move, relocation was warranted).

26. New Hampshire also employs a shifting burden analysis similar to Indiana's approach. See N.H. REV. STAT. ANN. § 461-A:12 (Supp. 2008) (first the burden is on the custodial parent to prove by a preponderance that the relocation is for a legitimate purpose and that the purpose is reasonable in light of the circumstances, then the burden shifts to the nonrelocating parent to prove by a preponderance that the proposed relocation is not in the best interests of the child).

27. See *Rogers*, 876 N.E.2d at 1130.

28. See *Burgess v. Burgess*, 913 P.2d 473, 481 n.6 (Cal. 1996) (noting that an exception to the custodial parent's ability to relocate occurs when the decision to move is simply to frustrate the noncustodial parent's contact with the children).

which requires a modification of the prior custody award.<sup>29</sup> In South Carolina, for example, the court in *Latimer v. Farmer* abolished a presumption against relocation, and reasoned that “restrictions on relocation have become antiquated in our increasingly transient society.”<sup>30</sup> The court further stated that “[t]he presumption against relocation is a meaningless supposition to the extent a custodial parent’s relocation would, in fact, be in the child’s best interest.”<sup>31</sup> However, in formulating a new standard for cases involving relocation disputes, the court moved entirely away from any standard favoring the noncustodial parent and created a presumption in favor of relocation. Under the current South Carolina relocation law, in order to prevent relocation, the noncustodial parent must petition for a change of custody by proving: (1) a sufficient change in circumstances affecting the welfare of the child; and (2) the change in custody would be in the best interests of the child.<sup>32</sup> Additionally, the court held that relocation alone is not a sufficient change in circumstances. In fact, the court found that “it should not be assumed merely relocating and potentially burdening the non-custodial parent’s visitation rights always negatively affects the child’s best interests.”<sup>33</sup>

Standards that place the burden on the nonrelocating parent to show that a child’s present environment is dangerous, or to demonstrate that there has been a substantial change in circumstances beyond relocation, have the effect of favoring the custodial parent, while undermining the child’s best interest.<sup>34</sup>

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29. See, e.g., *Spain v. Holland*, 483 So. 2d 318, 320-21 (Miss. 1986) (finding that in order to prevent relocation, a noncustodial parent needs to demonstrate that a modification in custody is warranted, and therefore must prove a material change in circumstances that adversely affect the child, and that relocation per se does not produce “an adverse impact upon the children so as to require a change of custody”); *Hawkes v. Spence*, 878 A.2d 273, 277-78 (Vt. 2005) (finding that, because the custodial parent “has a right to determine the children’s residence, and because allowing the new family unit to flourish necessarily benefits the children of that family . . . when a noncustodial parent seeks a change in custody based solely on the custodial parent’s decision to relocate, the moving party faces a high hurdle in justifying the violent dislocation of a change in custody from one parent to the other”).

30. 602 S.E.2d 32, 34 (S.C. 2004); see also *McAlister v. Patterson*, 299 S.E.2d 322, 323 (S.C. 1992) (finding a presumption against relocation and denying custodial parent’s petition for relocation), *overruled by* *Latimer v. Farmer*, 602 S.E.2d 32 (S.C. 2004).

31. *Farmer*, 602 S.E.2d at 35.

32. *Id.*

33. *Id.*

34. *But see* *Parish v. Spaulding*, 496 S.E.2d 91, 93-94 (Va. Ct. App. 1998) (finding that whenever the evidence suggests that the relocation of the custodial parent may not be in the child’s

For example, if the noncustodial parent fails to demonstrate a dangerous environment or a substantial change in circumstances, the custodial parent may relocate by default without having to prove that the move would benefit the child.<sup>35</sup>

#### 4. *Social Science Research Supporting Standards That Favor Relocation*

In determining which standard to apply in relocation cases, courts have frequently looked to the research of scholars to support their position.<sup>36</sup> Courts often rely on scholarly research presenting the attachment theory as support for a presumption in favor of relocation. The attachment theory maintains that a child's ability to form and sustain a healthy, intimate relationship across its life span depends on its ability to have a close and consistent relationship with its mother during infancy and early childhood.<sup>37</sup> Based on this principle, scholar, Judith Wallerstein, one of the most prominent proponents of the custodial parent, argues for a presumption in favor of relocation, subject only to the court's power to restrain a move that would prejudice the welfare of the child.<sup>38</sup>

Dr. Wallerstein argues that it is unrealistic to expect that any

best interests, the relocation of the custodial parent constitutes a material change in circumstances).

35. See *Jaramillo v. Jaramillo*, 823 P.2d 299, 308 (N.M. 1991).

36. See, e.g., *Silvan v. Alcina*, 105 P.3d 117, 121 (Alaska 2005); *Hollandsworth v. Knyzewski*, 109 S.W.3d 653, 660 (Ark. 2003); *In re Marriage of Ciesluk*, 113 P.3d 135, 145 (Colo. 2005); *Ireland v. Ireland*, 717 A.2d 676, 681 (Conn. 1998); *Forstmann v. Forstmann*, No. FSTFA020189659S, 2007 WL 4733054, \*5 (Conn. Super. Dec. 17, 2007); *Scott v. Scott*, 578 S.E.2d 876, 880 (Ga. 2003); *Bodne v. Bodne*, 588 S.E.2d 728, 730 (Ga. 2003); *Fenwick v. Fenwick*, 114 S.W.3d 767, 789 n.91 (Ky. 2003); *Braun v. Headley*, 750 A.2d 624, 630 (Md. Ct. Spec. App. 2000); *Mason v. Coleman*, 850 N.E.2d 513, 518 (Mass. 2006); *Tufts v. Tufts*, No. 05-P-329, 2006 WL 2072937 (Mass. App. Ct. July 26, 2006); *In re Marriage of Goldman*, 725 N.W.2d 747, 754 (Minn. Ct. App. 2007); *Martin v. Martin*, 90 P.3d 981, 983 n.5 (Nev. 2004); *Baures v. Lewis*, 770 A.2d 214, 222 (N.J. 2001); *Salichs v. James*, 268 A.D.2d 168, 171 (N.Y. App. Div. 2000); *Maynard v. McNett*, 710 N.W.2d 369, 374 (N.D. 2006); *Kaiser v. Kaiser*, 23 P.3d 278, 284 n.2 (Okla. 2001); *Marriage of Hamilton-Waller*, 123 P.3d 310, 312 n.3 (Or. Ct. App. 2005); *Gancas v. Schultz*, 683 A.2d 1207, 1212 (Pa. Super. Ct. 1996); *Dupre v. Dupre*, 857 A.2d 242, 255 (R.I. 2004); *In re Marriage of Pape*, 989 P.2d 1120, 1127 (Wash. 1999).

37. Bruch, *supra* note 1, at 285 (citing Inge Bretherton, *The Origins of Attachment Theory: John Bowlby and Mary Ainsworth*, 28 DEV. PSYCHOL. 759, 770-71 (1992)).

38. Wallerstein & Tanke, *supra* note 13, at 305. Judith Wallerstein, Ph.D., is a psychologist and researcher whose research focuses on the long-term effects of divorce. She also founded the Center for the Family in Transition in Marin County, California, in 1980. This article was adapted from an amica curiae brief filed on behalf of Dr. Wallerstein in the California Supreme Court case of *In re Marriage of Burgess*, 913 P.2d 473 (1996).

family in contemporary American society, whether intact or divorced, will remain in one geographic location for an extended period of time. Therefore, she contends that a child's community or network following divorce should not be regarded as a continuing source of his or her stability.<sup>39</sup> Rather, Dr. Wallerstein believes that "a close, sensitive relationship with a psychologically intact, conscientious custodial parent" is one of the main factors associated with good outcomes for children in post-divorce families.<sup>40</sup> She argues that court intervention to prevent a custodial parent's relocation disrupts the child's relationship with the custodial parent and will result in serious psychological harm to both the child and the parent.<sup>41</sup> Wallerstein reasons that the post-divorce psychological adjustment of the custodial parent relates directly to the child's adjustment, and, as a result, a child's knowledge that he or she has been the cause of the parent's profound disappointment in losing the benefit of the move can become a terrible burden for the child to bear, causing great anguish and self-blame.<sup>42</sup>

Moreover, Wallerstein found that the noncustodial parent's post-divorce adjustment is not related to his or her child's adjustment. In fact, she claims that "[t]here is no evidence in [her] work of many years . . . that frequency of visiting or amount of time spent with the noncustodial parent over the child's entire growing-up years is significantly related to good outcome in the child or adolescent."<sup>43</sup> Dr. Wallerstein further states that "frequent access to the noncustodial parent . . . when it involves shuttling back and forth between the two homes . . . can be seriously detrimental to children . . ." <sup>44</sup> Various scholars are in accord with Wallerstein, and find that the developmental effects of the noncustodial parents are limited. These scholars agree that parenting by the custodial parent is the most effective protection of a child's post-divorce well-being. Accordingly, custodial parent proponents argue that the more effectively a custodial parent can function, the

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39. Wallerstein & Tanke, *supra* note 13, at 310.

40. *Id.* at 311.

41. *Id.*

42. *Id.* at 314-15.

43. *Id.* at 312.

44. *Id.* at 314.

better the child's adjustment will be.<sup>45</sup>

An additional argument of custodial parent proponents centers upon families that are products of high conflict divorce. Scholars have found that during divorce children become distressed and particularly worried about the depression they see in both their father and mother at the time of the breakup. This worry then becomes exacerbated when children witness high conflict between their parents after divorce.<sup>46</sup> Therefore, custodial parent proponents argue that the high potential for continued or re-opened conflict, as in the relocation issue, can severely threaten the child's sense of security, as the unintended effect of post-divorce conflict is often that the child feels emotionally safe nowhere, viewing "the world as an armed camp in which the child can trust no one."<sup>47</sup> As a result, research shows psychological deterioration among both boys and girls when frequent contact is ordered over the objection of one or both parents in these intensely conflicted families.<sup>48</sup> Accordingly, scholars have found that frequent access to the noncustodial parent can be seriously detrimental to children when there is intractable, continuing high conflict between parents.<sup>49</sup>

### B. Critique of a Presumption in Favor of Relocation

A presumption in favor of the relocating parent, regardless of the type, frustrates achievement of the ultimate goal of determining an arrangement that will serve the child's best interests. Presumptions often reflect a legislative or judicial determination that certain situations tend to benefit children, while others tend to harm them.<sup>50</sup> "The role of the presumption is to

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45. See Judith Soloman & Zeynep Biringen, *The Continuing Debate About Overnight Visitation: Another Look at the Developmental Research, Commentary on Kelly and Lamb's "Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children,"* 39 FAM. CT. REV. 355 (2001); E. MAVIS HEATHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 88 (W.W. Norton Co. 2002).

46. Wallerstein & Tanke, *supra* note 13, at 309.

47. *Id.* at 311 (quoting Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Sole Physical Custody Families*, 59 AMER. J. ORTHOPSYCH. 576, 580 (1989)).

48. Soloman & Biringen, *supra* note 45, at 361.

49. *Id.*

50. Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381, 385 n.14 (2006).

create a base line value judgment and to add predictability and consistency to the process of adjudication.”<sup>51</sup> Moreover, presumptions function to counteract the tendency of some courts to make judgments based on ignorance or stereotypes.<sup>52</sup> Accordingly, presumptions are justified only if there is good reason to believe that applying the presumption will improve the overall quality of decisions.<sup>53</sup>

In the typical model of adversary litigation—in which one party’s interests are pitted against those of the opposing party—the use of presumptions and the assignment of burdens of proof usually effectuates the relevant policy goals involved in determining who wins and who loses.<sup>54</sup> However, in relocation cases the interests of a third party—the children—are paramount and will be significantly affected by the outcome. Therefore, in such circumstances, a judgment establishing that one parent’s interests should be vindicated by imposing a presumption in favor of that party subordinates the interests of the child.

Employing presumptions in the context of relocation moves the court’s inquiry away from the interests of the child and towards the interest of the favored parent. In the clash over the litigating parties’ competing hopes and desires, the interests of the unrepresented child are often overlooked.<sup>55</sup> For example, when there is a presumption in favor of relocation and the nonrelocating party fails to meet his or her burden of rebutting the presumption, the relocating party prevails by “something akin to default,” but not necessarily because relocation is in the best interest of the child.<sup>56</sup> This is improper be-

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51. *Id.*

52. Katherine Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project*, 36 FAM. L.Q. 11, 23 (2002).

53. Wald, *supra* note 50.

54. *Id.* The “burden of proof” is defined as “[a] party’s duty to prove a disputed assertion or charge” and “includes both the *burden of persuasion* and the *burden of production*.” BLACK’S LAW DICTIONARY 83 (3d Pocket ed. 2006).

55. *Jaramillo v. Jaramillo*, 823 P.2d 299, 307-08 (N.M. 1991).

56. *Id.* at 308. Some courts have recognized the unjust result that occurs in certain cases when courts are forced to follow a precedent that mandates a presumption in favor of relocation. In an attempt to rectify the unjust result that occurs in these cases, trial courts have implicated virtual visitation in hopes of making up for a child’s loss of significant time with their noncustodial parent. See *Lazarevic v. Fogelquist*, 668 N.Y.S.2d 320, 321 (N.Y. Sup. Ct. 1997) (ordering virtual visitation after the court found that “maintaining the status quo would undoubtedly be in [the child’s] best interest,” but that “such an outcome is regrettably outside

cause the factual circumstances surrounding each case differ tremendously, and no single factor, including the interests of the parent, should be treated as dispositive or given such disproportionate weight as to predetermine the outcome. The New York Supreme Court explained:

There are undoubtedly circumstances in which the loss of midweek or every weekend visits necessitated by a distant move may be devastating to the relationship between the noncustodial parent and the child. However, there are undoubtedly also many cases where less frequent but more extended visits over summers and school vacations would be equally conducive, or perhaps even more conducive, to the maintenance of a close parent-child relationship, since such extended visits give the parties the opportunity to interact in a normalized domestic setting.<sup>57</sup>

Additionally, despite the very complex factual circumstances described previously in the *Rogers* case, such a case would be resolved rather simply in states explicitly or implicitly employing a presumption in favor of relocation. The court would not perform an inquiry into the best interests of the child, as the child's interests are presumed to be intertwined with those of the custodial parent.<sup>58</sup> Therefore, in states favoring the custodial parent's decision to relocate, Laura, the custodial parent, would be permitted to move to the destination of her choice.

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this court's power"). See generally Sarah Gottfried, *Virtual Visitation: The New Wave of Communication Between Children and Noncustodial Parents in Relocation Cases*, 9 CARDOZO WOMEN'S L.J. 567 (2003); Sarah Gottfried, *Virtual Visitation: The Next Generation of Options for Parent-Child Communication*, 36 FAM. L.Q. 303 (2002). Virtual visitation, also called "internet visitation," refers to the use of email, instant messaging, webcams, and other internet tools to provide regular contact between a noncustodial parent and his or her child. Elisabeth Bach-Van Horn, *Virtual Visitation: Are Webcams Being Used as an Excuse to Allow Relocation*, 21 J. AM. ACAD. MATRIMONIAL LAW. 171, 172 (2008). Nevertheless, it is unrealistic to believe that virtual visitation can be a substitute for the actual presence of a child's noncustodial parent. See *id.* ("Although seeing her parent's image on the computer monitor and hearing her parent's voice read her a bedtime story from a computer speaker can be more fulfilling for a child than not seeing or hearing that parent at all, the availability of such technology should not be used as a substitute for the physical presence of a parent whenever possible.").

57. *Tropea v. Tropea*, 665 N.E.2d 145, 150 (N.Y. 1996).

58. See, e.g., *Hollandsworth v. Knyzewski*, 109 S.W.3d 653, 659 (Ark. 2003) ("[T]he close link between the best interests of the custodial parent and the best interest of the child. . . . [justifies] a presumption that the custodial parent's choice to move with the children should generally be allowed.").

Analogous to the facts of *Burgess*, Laura's proposed relocation was in part employment-related, had the potential to provide a financial benefit, and was not for the purpose of frustrating Gerry's relationship with the children.<sup>59</sup> For these same reasons Laura would, and did, prevail under Indiana's shifting burden analysis. In fact, in *Rogers*, the Indiana Court of Appeals did not consider how losing frequent contact with their father would affect the children. Rather, the court very simply disposed of Gerry's claim that the move was not in the best interests of the child. The court reasoned that the evidence showed that "[Laura] has moved into a specific location where she has strong family ties, where she is able to and has, in fact, purchased a home and she has specific employment plans to teach in the Texas school system" and that "the children could easily make new friends."<sup>60</sup> Laura would have also prevailed by default in South Carolina, in which a noncustodial parent can only prevent relocation through a modification of the current custody order. Gerry would not be able to demonstrate Laura was a danger to the children, as required in South Carolina.<sup>61</sup>

Therefore, given the variety of possible permutations of any given case, it is counterproductive to rely on presumptions of which the only real value is to simplify what are extremely complicated inquiries.<sup>62</sup> In the words of the United States Supreme Court, a presumption "forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child . . . [and] therefore cannot stand."<sup>63</sup> In other words, relocation cases are too complex to be satisfactorily handled within any mechanical, parent-oriented analysis that "prevents or interferes with a simultaneous weighing and comparative analysis of all of the relevant facts and circumstances"

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59. See *Burgess v. Burgess*, 913 P.2d 473, 477 (Cal. 1996) (custodial parent's acceptance of a job transfer located forty miles away was found to be legitimate reason for relocation).

60. *Rogers v. Rogers*, 876 N.E.2d 1121, 1131. (Ind. Ct. App. 2007).

61. See *Latimer v. Farmer*, 602 S.E.2d 32, 34-35 (S.C. 2004).

62. See Betty Levinson, *Handling Domestic Violence Case*, in *ESTATE PLANNING AND ADMINISTRATION* 2000, 11, 62 (PLI Estate Planning, Course Handbook Series No. 296, 2000).

63. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); see also *Jaramillo v. Jaramillo*, 823 P.2d 299, 308 (N.M. 1991) (quoting *Stanley*, 405 U.S. at 656).

that are involved in a child's well-being.<sup>64</sup>

However, some courts justify a presumption in favor of relocation by explicitly relying on the research of social scientists, which states that the interests of the child are intertwined with those of the custodial parent.<sup>65</sup> Although it is important for courts to become educated on the relocation debate and the research supporting each side, such research should not be relied upon to construct determinative relocation standards. Courts and legislatures should only refer to scholarly research to assist them in gaining a better understanding of the major interests at stake in relocation disputes. On the other hand, courts should not be making value judgments by deciding which research should or should not be credited for various reasons.

First, judges, lawyers, and legislators, who are the publications' intended audience, often lack the statistical or scientific training needed to evaluate the quality of the author's research.<sup>66</sup> Such training is often needed when dealing with scientific literature because some social scientists rely heavily on their own prior research, and frequently make broad generalizations without providing support. Unfortunately, it is often difficult for non-expert readers, such as lawyers and judges, to distinguish fact from opinion.<sup>67</sup> Additionally, some critics argue that "[m]any recent articles on the topic of child custody law in legal, inter-disciplinary, and even scientific journals

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64. *Tropea v. Tropea*, 665 N.E.2d 150, 151 (N.Y. 1996).

65. See, e.g., *Hollandsworth v. Knyzewski*, 109 S.W.3d 653, 660 (Ark. 2003) ("[S]ocial science research links a positive outcome for children of divorce with the welfare of the primary custodian and the stability and happiness within that newly formed post-divorce household.") (quoting *Baures v. Lewis*, 770 A.2d 214 (N.J. 2001)); *Ireland v. Ireland*, 717 A.2d 676, 681 (Conn. 1998) ("The notion that relocation might be in the best interests of the child, in large part because such a move would also be in the best interests of the custodial parent, finds support in the writings of legal scholars."), *superseded by statute*, CONN. GEN. STAT. ANN. § 46b-56d (West Supp. 2008) ("[T]he relocating parent shall bear the burden of proving, by a preponderance of the evidence, that (1) the relocation is for a legitimate purpose, (2) the proposed location is reasonable in light of such purpose, and (3) the relocation is in the best interests of the child.").

66. *Bruch*, *supra* note 1, at 297-98. *Bruch* further argues that the authors of concern often publish exclusively or primarily in legal journals and not scientific ones to avoid the rigorous peer review that the leading scientific journals provide to ensure scientific merit. *Id.* She states that, "[a]lthough the legal journals in which they publish test the paper's relevance to legal debates, they usually are unable to assess scientific merit. The risk of inaccuracies is therefore real, and specialists in allied fields, who do not normally read law reviews, may never catch them." *Id.*

67. *Id.* at 298.

contain serious misstatements of the research literature.”<sup>68</sup> Specifically, it has been argued that substantial literature regarding the effects of divorce on children’s adjustment “is replete with methodological problems, especially sampling.”<sup>69</sup> Therefore, because legal minds are ill-equipped to judge the quality of empirical studies, they should not be articulating determinative standards based on such research.<sup>70</sup>

A second reason why courts should not rely on social science research when crafting strict standards in relocation cases is the fact that research findings are often in the form of aggregate data and can offer only a general guideline for individual cases. In fact, much of the scientific data cited by the courts was developed not to determine the legal issues of relocation, but rather as an attempt to examine and explain “children’s adjustment to divorce and other significant life events and traumas.”<sup>71</sup> In addition, research-based analyses and conclusions tend to be fact-specific, focusing on children of a certain age. Such research, the majority of which was not developed with the purpose of addressing the legal issues involved in relocation, should not be used by the court as a basis for the application of rigid standards favoring one parent over another.<sup>72</sup> This is not to say that courts and legislatures cannot examine this material to become more knowledgeable about the sensitive issues involved in relocation cases. In fact, such research would serve as an ideal backdrop to considering what factors should be used in a best interests of the child determination. However, courts should not be relying on such information to formulate decisive, mechanical, and parent-oriented analyses in relocation disputes.

### C. *Standards Favoring the Noncustodial Parent*

The remainder of courts employing parent-oriented analyses in relocation disputes have crafted an approach that favors the noncustodial parent. Unlike the various standards favoring

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68. *Id.*

69. William G. Austin, *A Forensic Psychology Model of Risk Assessment for Child Custody Relocation Law*, 38 FAM. & CONCILIATION CTS. REV. 192, 197 (2000). Note that “sampling” is the act or process of selecting a sample for testing, analyzing, etc.

70. Bruch, *supra* note 1, at 297.

71. Austin, *supra* note 69, at 197.

72. *Id.*

the custodial parent, courts and legislatures that are sensitive to the interest of noncustodial parent simply place the burden of proof on the relocating parent. Courts justify this approach by relying on the alternative social science research that argues that stability in custody arrangements is defeated by relocation and that maintaining a meaningful relationship with both parents is in the child's best interests. This section of the paper will first discuss the approach courts use to favor the rights of the noncustodial parent, as well as the social science research these courts use to support their analysis. It will then explain why such an approach is also contrary to the best interests of the child.

### 1. *Standard Favoring the Noncustodial Parent*

As mentioned previously, relocation disputes present courts with a unique challenge "to promote the best interest of the child while affording protection equally between a [custodial] parent's right to travel and a [noncustodial] parent's right to parent."<sup>73</sup> Many jurisdictions have taken the position that children always benefit from having a meaningful relationship with both parents following divorce and, as a result, have imposed on the moving party the burden of proving that the relocation is in the best interests of the child.<sup>74</sup> For example, the

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73. *Fredman v. Fredman*, 960 So. 2d 52, 58 (Fla. Dist. Ct. App. 2007) (finding that, when a primary residential parent seeks to relocate, section 61.13(2)(d) of the Florida Statutes requires the court to consider all of the statutory factors without any presumptions in favor of either party); see FLA. STAT. ANN. § 61.13(2)(d) (West Supp. 2008).

74. See, e.g., *M.A.W. v. T.W.*, No. CN01-09945, 2003 WL 21435299, \*11 (Del. Fam. Ct. Jan. 27, 2003) ("The removal of the children from primary residence with Mother in Delaware to primary residence with Mother in Florida should only be permitted when it is shown that the move will enhance the overall quality of the children's lives."); *Roberts v. Roberts*, 64 P.3d 327, 331 (Ida. 2003) ("[I]n Idaho, the moving parent has the burden of proving relocation would be in the best interests of the child before moving in violation of a previous custody arrangement."); *In re Eckert*, 518 N.E.2d 1041, 1046 (Ill. 1988) ("A reasonable visitation schedule is one that will preserve and foster the child's relationship with the noncustodial parent. When a parent has assiduously exercised his or her visitation rights, 'a court should be loath to interfere with it by permitting removal of the children for frivolous or unpersuasive or inadequate reasons.'" (internal citations removed)); *Vogel v. Vogel*, 637 N.W.2d 611, 630 (Neb. 2002) ("Under Nebraska law, the burden has been placed on the custodial parent to satisfy the court that he or she has a legitimate reason for leaving the state and to demonstrate that it is in the child's best interests to continue living with him or her.") (citing *Brown v. Brown*, 621 N.W.2d 70, 80 (Neb. 2000)); *Calhoun v. Golian*, No. COA06-1525, 2007 WL 2701352, at \*2-3 (N.C. Ct. App. Sept. 18, 2007) (holding that the relocating parent must show there was a substantial change in circumstances warranting a modification of custody to allow her to relocate with

Idaho Supreme Court specifically rejected California's approach in *Burgess*.<sup>75</sup> The court found that reversing the traditional presumption against relocation and placing the burden on the noncustodial parent to present why a move is not in the child's best interests "is contrary to Idaho law."<sup>76</sup> Instead, the court found that because "Idaho favors the active participation of both parents in raising children after divorce . . . the moving parent has the burden of proving relocation would be in the best interests of the child."<sup>77</sup> Similarly, relocation statutes in Arizona and Missouri provide that the relocating parent has the burden of proving that the move is in the best interests of the child. Both statutes express that the legislative policy behind placing the burden on the relocating parent is to further the goal of ensuring that a child has frequent and meaningful contact with the noncustodial parent.<sup>78</sup>

Additionally, the North Dakota Supreme Court in *Stout v. Stout* interpreted the amended section 14-09-07 of the North Dakota Century Code<sup>79</sup> to place the burden of proof on the

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the child, as the current schedule allowed frequent visitation with the noncustodial parent); *In re Marriage of Cooksey*, 125 P.3d 57, 66 (Or. Ct. App. 2005) (affirming trial court's decision that mother did not demonstrate that relocation was in the best interests of the child); *Gruber v. Gruber*, 583 A.2d 434, 440 (Pa. Super. Ct. 1990) "When a custodial parent seeks to relocate at a geographical distance and the non-custodial parent challenges the move, the custodial parent has the initial burden of showing that the move is likely to significantly improve the quality of life for that parent and the children,"); *see also* ARIZ. REV. STAT. ANN. § 25-408 (2007); 750 ILL. COMP. STAT. 5/609 (West 1999); LA. REV. STAT. ANN. § 9:355.13 (2008); MINN. STAT. ANN. § 518.175 (West 2006); MO. ANN. STAT. § 452.377 (West 2003); N.D. CENT. CODE § 14-09-07 (2004).

75. *Roberts*, 64 P.3d at 331.

76. *Id.*

77. *Id.*

78. ARIZ. REV. STAT. ANN. § 25-408 ("The burden of proving what is in the child's best interest is on the parent who is seeking to relocate the child," and requiring that "the court shall . . . ensure the continuation of a meaningful relationship between the child and both parents."); MO. REV. STAT. § 452.377 ("The party seeking to relocate shall have the burden of proving that the proposed relocation is made in good faith and is in the best interest of the child," and mandating that the court "assure that the child has frequent, continuing and meaningful contact with the nonrelocating party."); *see also* MINN. STAT. § 518.175 ("The burden of proof is upon the parent requesting to move the residence of the child to another state, except that if the court finds that the person requesting permission to move has been a victim of domestic abuse by the other parent, the burden of proof is upon the parent opposing the move.").

79. Section 14-09-07 of the North Dakota Century Code first read: "A parent entitled to the custody of a child *shall not* change the residence of the child to another state except upon order of the court or with the consent of the noncustodial parent, where the noncustodial parent has been given visitation rights by the decree, however, a court order shall not be required if the noncustodial parent has not exercised such visitation rights for a period of one year." (emphasis added). Section 14-09-07 now reads: "A parent entitled to the custody of a child *may not*

custodial parent to prove that the move is in the best interests of the child, as long as the noncustodial parent exercised his or her right to visitation.<sup>80</sup> The court found there to be no presumption in favor of relocation. Instead, the court reasoned that the custodial parent must bear the burden because the statute was amended with the goal of minimizing the chance of the custodial parent defeating the visitation rights of the noncustodial parent by moving the children out of North Dakota.<sup>81</sup> The court concluded that "the limited purpose of the statute is to safeguard the visitation rights of the noncustodial parent and to thereby maintain and promote the parent and child relationship."<sup>82</sup>

Courts, such as those in Idaho and North Dakota, who favor the committed involvement of both parents following a divorce, are not without support. In fact, various social scientists advocate the position of the noncustodial parent in relocation disputes.

## 2. *Social Science Research in Support of a Standard Favoring the Noncustodial Parent*

Courts who favor the active participation of both parents in raising children after divorce are not alone in their support of the noncustodial parent in relocation disputes. Various social scientists, including Joan Kelly, Michael Lamb, William Austin, and Richard Warshak, are proponents of the noncustodial parent.<sup>83</sup> These authors strongly disagree with the conclusion of other social scientists that children of divorce benefit the

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change the residence of the child to another state except upon order of the court or with the consent of the noncustodial parent, if the noncustodial parent has been given visitation rights by the decree. A court order is not required if the noncustodial parent (1) has not exercised visitation rights for a period of one year or (2) has moved to another state and is more than fifty miles [80.47 kilometers] from the residence of the custodial parent." (emphasis added).

80. 560 N.W.2d 903, 913 (N.D. 1997).

81. *Id.* at 907.

82. *Id.* at 907-08.

83. Joan B. Kelly, Ph.D., is a clinical and research psychologist, assistant clinical professor at the University of California at San Francisco, and was previously director of the Northern California Mediation Center. Michael E. Lamb, Ph.D., is head of the Section on Social and Emotional Development at the National Institute of Child Health and Human Development. Richard Warshak is a clinical, consulting, and research psychologist in private practice and clinical professor at the University of Texas Southwestern Medical Center at Dallas. William G. Austin is a licensed clinical and forensic psychologist, currently in private practice in Colorado.

most when their relationship with their primary custodial parent is protected. Instead, noncustodial parent proponents assert that children could be spared much post-divorce harm if the laws guaranteed frequent visitation arrangements that are possible only if the parents' homes are in close proximity. Therefore, proponents of noncustodial parents urge courts to require custodial parents to reside near the child's noncustodial parent.<sup>84</sup>

Richard Warshak, a supporter of noncustodial parents, directly criticizes many of Wallerstein's findings discussed above.<sup>85</sup> For example, Warshak argues that "it is error to assume that because the noncustodial father's own psychological adjustment does not correlate as strongly or as obviously with the child's adjustment as does the custodial mother's adjustment, the child will be unaffected by the father's absence."<sup>86</sup> Lamb and Kelly add that "even when fathers are 'secondary' attachment figures, child father attachments are affectively meaningful to young children." Therefore, they claim that "[c]hildren who are deprived of meaningful relationships with one of their parents are at a greater risk psychosocially."<sup>87</sup>

Moreover, Warshak argues that the custodial parent suffers when noncustodial parent-child relationships are undermined. He explains that custodial parents "are more likely to receive the expressions of frustration and anger that their children suppress while 'guests' in their father's home."<sup>88</sup> Likewise, although post-divorce research has shown that a mother's satisfaction is a significant factor in a child's well-being, other so-

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84. See Austin, *supra* note 72, at 197; Joan B. Kelly & Michael E. Lamb, *Developmental Issues in Relocation Cases Involving Young Children: When, Whether, and How*, 17 J. FAM. PSYCH. 193 (June 2003) [hereinafter Kelly & Lamb, *Developmental Issues*]; Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83 (2000) [hereinafter Warshak, *Burgess Revisited*]; see also Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION COURTS REV. 297 (2000) [hereinafter Kelly & Lamb, *Using Child Development Research*]; Richard A. Warshak, *Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence*, 37 FAM. L.Q. 273 (2003); .

85. See discussion *supra* Part II.A.4.

86. Warshak, *Burgess Revisited*, *supra* note 84, at 87. He seemingly turns the custodial rights versus noncustodial rights debate into a mothers' rights versus fathers' rights debate, as he consistently uses the term mother and father, rather than custodial and noncustodial parent.

87. Lamb & Kelly, *Developmental Issues*, *supra* note 84, at 197; Lamb & Kelly, *Using Child Development Research*, *supra* note 87, at 369.

88. Warshak, *Burgess Revisited*, *supra* note 84, at 94.

cial science research has demonstrated that a mother's satisfaction is likely to be linked to the father's contentment regarding time spent with his children.<sup>89</sup>

Lastly, Warshak argues that, should a court disallow relocation, the custodial parent is not confined to a certain place for his or her entire life. Rather, he points out that the custodial parent is only "confined" to that place while the children are growing up. In response to Wallerstein's suggestion that children may feel guilty for being the cause of a parent's inability to relocate, Warshak counters that children may also experience guilt for leaving the noncustodial parent behind.<sup>90</sup> Accordingly, it is the principles specified by social scientists such as Warshak that lead courts to consider a presumption in favor of the noncustodial parent to be the proper standard in adjudicating relocation disputes.

#### *D. Critique of Presumption in Favor of the Noncustodial Parent*

As mentioned in Part B, the use of presumptions and the assignment of burdens of proof in customary litigation generally serves the policy considerations involved in determining who succeeds. Presumptions and burdens often provide predictability and stability in litigation. Additionally, strict standards in the relocation context would certainly make the jobs of attorneys and judges much easier.<sup>91</sup> However, "the complex nature of the human family, which is always unique and ever changing," makes it highly unlikely that rigid standards will be appropriate for cases involving individual and family life cycles.<sup>92</sup>

Regardless of the compelling facts of a case, the relocating party stands to lose in jurisdictions that expressly presume that a child benefits from a relationship with both parents, and, hence, places the burden on the custodial parent. Such an approach subordinates the best interests of the child. For example, when the relocating party fails to meet his or her burden, the nonrelocating parent automatically succeeds. How-

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89. Valarie King & Holly E. Heard, *Nonresident Father Visitation Parental Conflict, and Mother's Satisfaction: What's Best for Child Well-Being*, 61 J. MARRIAGE & FAM. 385, 394 (1999).

90. Warshak, *Burgess Revisited*, *supra* note 84, at 99.

91. Shelley A. Riggs, *Is The Approximation Rule in the Child's Best Interests: A Critique from the Perspective of Attachment Theory*, 43 FAM. CT. REV. 481, 490 (2005).

92. *Id.*

ever, the nonrelocating parent's success does not necessarily correlate with the best interests of the child.<sup>93</sup> Rather, the nonrelocating parent's success correlates with the fact that the jurisdiction determined that it supports the noncustodial parent's interest in maintaining a relationship with the child. The problem with this determination is that maintaining a close relationship with both parents may not be in the best interests of some children. As a result, a presumption "may work well for some families—or at least do little harm—but may impede achievement of the child's interests in the substantial number of cases in which it does not fit the family's circumstances."<sup>94</sup>

If the *Rogers* case were tried under an approach favoring the noncustodial parent, the court would focus upon whether or not relocation would hinder the child's relationship with Gerry, the noncustodial parent. Under Illinois law, because Gerry "assiduously exercised" his visitation rights, the court would "be loath to interfere with it by permitting removal of the children."<sup>95</sup> In an Oregon case that was factually similar to *Rogers*, the court also held in favor of the noncustodial parent.<sup>96</sup> The Oregon court focused on the father's relationship with the child and reasoned that "[the] record shows that both parents are loving and intimately involved with the care and upbringing of the child. Mother is indeed the 'primary caregiver' but, as the custody evaluator reported . . . father is especially close . . . and has been continuously involved with the [child's] upbringing."<sup>97</sup> The Oregon court's analysis demonstrates its deference to the noncustodial parent's interest in maintaining a relationship with the child. Gerry would certainly prevail under such an approach, but not necessarily because that outcome is in the best interests of the child.

Jurisdictions that base their noncustodial parent oriented standards on the principle that a child's ability to maintain a meaningful relationship with both parents is in his or her best interests often rely on social science research to support their

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93. See generally Bruch, *supra* note 1.

94. Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 477 (1999).

95. *In re Marriage of Eckert*, 518 N.E.2d 1041, 1046 (Ill. 1988) (internal citations removed).

96. See *In re Marriage of Cooksey*, 125 P.3d 57, 62 (Or. App. Ct. 2005).

97. *Id.* at 65.

position.<sup>98</sup> However, as it is improper for courts favoring the relocating parent to base their approach on scholarly research, it is also improper for courts favoring the nonrelocating parent to base their decisions on such research. As described above, it is important for courts to use research to better understand the relocation debate. Nevertheless, courts should not be relying on such research to construct rigid standards for adjudicating relocation disputes. As discussed in detail in Part B, misstatements in journals and methodological problems in research often occur, and judges and lawyers lack statistical or scientific training necessary to judge the quality of empirical studies.<sup>99</sup>

Moreover, as discussed more thoroughly above, there is a limited amount of research that actually focuses specifically on the effect relocation has on children of divorce. Furthermore, although some research shows that relocation can have a negative impact on children's adjustment, individuals vary greatly in how well they adapt to residential change.<sup>100</sup> Depending on the actual age of the child, his or her response to being separated from a caregiver may vary, as research "predict[s] differential responses to relocation in infants and toddlers versus preschool children versus school-age children."<sup>101</sup> Therefore, research based analysis and conclusions are very fact specific and should not be used by the court as a basis for the application of general, rigid standards favoring one parent over another. But even without relying on the fact-specific research of social scientists, courts and legal scholars have formulated flawed relocation standards by relying on the simple factor of how much time a parent spends with his or her child.

*E. Standards Based on the Amount of Time Spent with a Child:  
The Approximation Rule*

The American Law Institute (ALI) has proposed a set of default rules in the custody area which provide that, unless par-

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98. See, e.g., *Scott v. Scott*, 578 S.E.2d 876, 883 (Ga. 2003); *In re Paternity of Cheryl*, 746 N.E.2d 488, 495 (Mass. 2001); *Dupre v. Dupre*, 857 A.2d 242, 255 (R.I. 2004).

99. Bruch, *supra* note 1, at 297.

100. Austin, *supra* note 69, at 197; see also Kelly & Lamb, *Developmental Issues*, *supra* note 87.

101. Austin, *supra* note 69, at 197; see also Marion Gindes, *The Psychological Effects of Relocation for Children of Divorce*, 15 J. AM. ACAD. MATRIMONIAL LAW. 119 (1998) (discussing the potential effects of the developmental age of the child in relocation).

ents agree otherwise, “a parent should be allocated custodial responsibility in rough proportion to the share of responsibility the parent assumed before the divorce or the circumstances giving rise to the custody action.”<sup>102</sup> This approach to allocating custodial responsibility, often referred to as the approximation rule, prioritizes past-parenting involvement—“a factor that courts increasingly emphasize in applying the best interests test.”<sup>103</sup> According to Professor Katharine Bartlett, an ALI reporter, the ALI approach “amounts to a primary caretaker presumption when one parent has been exercising a substantial majority of the past caretaking, and it amounts to a joint custody presumption when past caretaking has been shared equally in the past.”<sup>104</sup> This section discusses the application of the approximation rule in the relocation context. It then analyzes the strengths and weaknesses of such an approach, and ultimately explains why such a standard is also inappropriate in relocation cases.

Under the ALI’s approximation rule, the custodial parent “is allowed to relocate with the child if that parent has been exercising a significant majority of the custodial responsibility and intends to move for a legitimate reason to a location that is reasonable in light of the purpose.”<sup>105</sup> If the parent does not meet that burden or has not been exercising a significant majority of custodial responsibility, the relocation triggers a reconsideration of the allocation of custodial responsibility, and possibly the shifting of primary custody to the nonrelocating parent.<sup>106</sup>

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102. Bartlett, *supra* note 94, at 479-80 (quoting American Law Institute Principles of the Law of Family Dissolution: Analysis and Recommendations, § 2.09 (May 16, 2008)).

103. Bartlett, *supra* note 94, at 479-80.

104. *Id.* at 480.

105. *Id.* at 481-82. The Principles specify legitimate reasons for relocation, including: (1) health justifications; (2) employment or educational opportunities; (3) proximity to support networks; and (4) protection of the child or another family member from abuse. *Id.* at 482.

106. *Id.* The approximation rule is similar to the “primary caretaker” presumption, which dictates an award of custody based on the courts finding as to which parent has been the primary caregiver for the child. The primary caretaker test seeks to reach the best interests of the child by preserving the most significant care-giving relationship in the child’s life. Elizabeth Barker Brandt, *Concerns at the Margins of Supervised Access to Children*, 9 J. L. & FAM. STUD. 201, 214 (2007). The jurisdictions that adopted this standard, however, have all abandoned the formal presumption. For example, the Minnesota Supreme Court adopted the primary caretaker presumption in *Pikula v. Pikula*, 374 N.W. 2d 705 (Minn. 1985), but backed away from the presumption four years later in *Sefkow v. Sefkow*, 427 N.W.2d 203, 212 (Minn. 1988). In Minnesota, “the primary caretaker presumption did not lead to reduced litigation in custody dis-

Wisconsin and Tennessee are the only two states that articulate presumptions based on the amount of time spent with a parent. The Tennessee Code provides:

If the parents are actually spending substantially equal intervals of time with the child and the relocating parent seeks to move with the child . . . No presumption in favor or against the request to relocate with the child shall arise. The court shall determine whether or not to permit relocation of the child based upon the best interests of the child.<sup>107</sup>

However, if the parents are not “actually spending substantially equal intervals of time with the child,” there is a presumption in favor of relocation for the parent spending the greater amount of time with the child unless the court finds:

- (a) The relocation does not have a reasonable purpose;
- (b) The 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 (c) The parent’s motive for relocating with the child is vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child.<sup>108</sup>

The West Virginia statute similarly grants a presumption in favor of relocation when the custodial parent is spending a greater amount of time with the children. The West Virginia statute is more specific than the Tennessee statute by stating that a parent “who has been exercising a significant majority of the custodial responsibility for the children,” defining “a significant majority” as seventy percent, can relocate so long as the relocation is in good faith, for a legitimate purpose, and to a reasonable location.<sup>109</sup> However, as in Tennessee, if neither parent has been exercising “a significant majority of the

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putes; rather the presumption may have fueled additional litigation as parties battled over the definition of ‘primary caretaker.’” Brandt, *supra*. For further materials related to the primary caretaker presumption see Kathryn L. Mercer, *The Ethics of Judicial Decision-Making Regarding Custody of Minor Children: Looking at the “Best Interests of the Child” and the “Primary Caretaker” Standards as Utility Rules*, 33 IDAHO L. REV. 389 (1997), and Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL’Y REV. 168 (1984).

107. TENN. CODE ANN. § 36-6-108(c) (West 2005).

108. TENN. CODE ANN. § 36-6-108(d) (West 2005).

109. W. VA. CODE ANN. § 48-9-403(d) (West 2002).

custodial responsibility for the child," the West Virginia court will reallocate custodial responsibility based on the best interests of the child.<sup>110</sup>

#### F. Critique of the Approximation Rule

Proponents of a presumption based on caretaking time claim that its benefits are substantial. It is argued that this presumption "focuses a factfinder on historical facts rather than on subjective questions about what is good for children, comparative judgments about the quality of emotional bonds and parental abilities, or future speculation about the different outcomes that might result from different custodial arrangements."<sup>111</sup> Additionally, it is believed that past caretaking patterns are a reliable proxy for significant intangible qualities that are difficult for courts to ascertain, such as parental abilities and emotional bonds.<sup>112</sup> Proponents of a time-based approach reason that if a "parent has been more involved with the child in the past, it may reasonably be supposed that parent is more experienced and emotionally connected to the child."<sup>113</sup> However, it has been reported that under an approximation standard, "[e]ach parent who has been minimally responsible with respect to a child in terms of child support or other manifestations of responsibility is guaranteed a minimum level of access."<sup>114</sup>

Advocates of the approximation standard also stress the benefits of such an approach, including greater predictability in custody outcomes, and reliance on the parents' past caretaking arrangements.<sup>115</sup> In theory, the demonstration of respect for parental autonomy and the reduction of uncertainty about custody determinations will prevent conflict, "strategic bargaining," and prolonged and expensive litigation.<sup>116</sup> Finally, the ALI suggests that an approximation rule will reduce "the likelihood of gender bias . . . by focusing the courts' attention on actual caretaking patterns rather than qualitative issues of

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110. W. VA. CODE § 48-9-403(d)(1).

111. Bartlett, *supra* note 94, at 480.

112. *Id.*

113. *Id.*

114. Bartlett, *supra* note 52, at 18.

115. *Id.*

116. Riggs, *supra* note 91, at 486.

parenting.”<sup>117</sup>

Nevertheless, courts will face significant difficulties in applying the approximation presumption. Because parental roles change over time, judges face the problem of determining how far back in a family’s history to determine who is spending more time with the children.<sup>118</sup> Most significantly, in the relocation context, an approximation rule will “likely result in disputes over how much time each parent actually invested in caring for the children” and “whose account of the child care status quo is more accurate.”<sup>119</sup> With such a premium placed on the single factor of how much time each parent invested in caring for the children, one can expect that this factor will become the focus of the dispute.<sup>120</sup> Thus, any “strategic bargaining” will not be reduced by an approximation rule, as such a rule invites parents to exaggerate, argue, and compile witnesses and experts regarding their contributions to childrearing.<sup>121</sup> Such a rule encourages parents who are anticipating a relocation to argue about who should care for the child, thus raising conflict rather than lowering it.<sup>122</sup>

The *Rogers* case highlights the difficulties in applying the approximation rule in a relocation context. In that case, due to Laura’s frequent visits to see her ailing father, Gerry’s time with the kids increased during the summer and fall of 2006.<sup>123</sup> Under these circumstances, a time-based presumption is likely to cause a dispute. In order to determine whether Laura performed a significant amount of the caretaking responsibility, she would argue that the court should look at the time each parent spent prior to the illness of her father in summer of 2006. Gerry, on the other hand, would argue that the court should look at caretaking situations after the summer of 2006. Therefore, under the approximation rule, the court is left to randomly decide which period of time to look at when deter-

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117. Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL’Y & L. 5, 20 (2002).

118. Andrew Schepard, *ALI’s Approximation Rule for Child Custody Disputes*, 231 N.Y.L.J. 3, 12 (2004).

119. Richard A. Warshak, *Punching the Parenting Time Clock: The Approximation Rule, Social Science, and the Baseball Bat Kids*, 45 FAM. CT. REV. 600, 604 (2007).

120. Schepard, *supra* note 118.

121. *Id.* at 13.

122. *Id.*

123. *Rogers v. Rogers*, 876 N.E.2d 1121, 1124 (Ind. Ct. App. 2007).

mining whether Laura has spent a significant amount of time with her children to warrant relocation.

More importantly, however, the amount of time a parent spends with a child is not a reliable proxy for the child's best interests because "quantity is not quality."<sup>124</sup> The approximation rule assumes that "the amount of time devoted by a parent to caretaking responsibilities corresponds directly with parenting ability and the strength of emotional attachment in the parent-child relationship."<sup>125</sup> Although time is clearly an important aspect in the development of attachment relationships, there are other factors that are more important than the time a child spends with a parent, such as the quality and the security of the bond formed.<sup>126</sup> "In other words, it is not how strongly attached the child is to the parent, but rather whether the child feels secure in his/her attachment to the parent that is associated with better child outcomes."<sup>127</sup>

The approximation rule does not recognize that comparative time spent may not adequately reflect each parent's emotional relationship with the child. For example, "[a] non primary caretaking . . . father who spends most of his hours working to provide financial support for his family might spend limited time with his daughter teaching her how to play softball, or a similarly situated mother might spend her limited time teaching her son how to cook."<sup>128</sup> The significance of their relationship to their children is not adequately measured by the time keeping that is at the core of the approximation presumption.<sup>129</sup> In the *Rogers* case, prior to the summer and fall of 2006, Gerry was active in his children's lives and acted as their baseball and soccer coach. Nevertheless, Laura was the custodial parent and the children resided with her.<sup>130</sup> Assuming because the children lived with Laura and she performed a significant amount of the custodial responsibility, is it fair to determine, without further evaluation of any other factor relating to the children's well-being, that preventing frequent contact

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124. Shepard, *supra* note 118, at 13-14; Warshak, *supra* note 119, at 607-08.

125. Riggs, *supra* note 91, at 486-87.

126. *Id.* at 487.

127. *Id.*

128. Shepard, *supra* note 118, at 16.

129. *Id.*

130. *Rogers v. Rogers*, 876 N.E.2d 1121, 1124 (Ind. Ct. App. 2007).

with Gerry would be in their best interests?

The approximation rule only considers physical care, time spent, and continuity as important to a child's best interests.<sup>131</sup> But if these were really the most critical issues to a child's wellbeing, given the prevalence of dual-earner families in our society, the courts would be allowing daycare workers, baby-sitters, and teachers to relocate with the children.<sup>132</sup> In the search "for determinacy, objectivity, and quantification" in relocation disputes, an approximation rule ignores "the reality of unpredictability, subjectivity, and qualitative differences in human behavior and emotion, which make all interpersonal relationships unique, including the parent-child attachment relationship."<sup>133</sup> Therefore, until a better alternative is established, the best interests of the child standard should be the courts' guide in relocation disputes. After all, the imprecise nature of the best interests standard accurately reflects "the complex nature of the human family, which is always unique and ever changing."<sup>134</sup>

### III. THE BEST INTERESTS OF THE CHILD STANDARD

The proper analysis in relocation disputes is a best interests of the child analysis, free of all presumptions and threshold determinations. The best interests of the child test is a standard that requires a judge to consider all of the relevant facts of a situation on a case-by-case basis to determine which custodial arrangement produces the best result for the child.<sup>135</sup> The acknowledged advantages of the test are as follows: (1) it relies on individualized determinations, rather than generalizations about what is good for the average child; (2) it focuses decision-making on the child, rather than on the interests of his or her parents; and (3) it creates the greatest amount of

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131. Riggs, *supra* note 91, at 487; see also *Caudill v. Foley*, 21 S.W.3d 203, 211-12 (Tenn. Ct. App. 1999) (finding that the best interests of the child are fundamentally interrelated with the best interests of the parent with whom the child spends the majority of his or her time, and allowing that parent to relocate with the child).

132. Riggs, *supra* note 91, at 487. Moreover, Riggs also notes that in other cases, "because the working parent in contemporary society is most often the father, the approximation rule may be unfairly biased against fathers and end up resembling little more than the maternal preference standard of the past."

133. *Id.* at 490.

134. *Id.*

135. Bartlett, *supra* note 94, at 470.

flexibility in decision-making.<sup>136</sup>

A. *Courts That Use a Best Interest of the Child Standard in Relocation Disputes*

The New York Court of Appeals, one of the first courts to employ such an analysis, held in *Tropea v. Tropea* that “each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is the most likely to serve the best interests of the child.”<sup>137</sup> The New York court agrees that the respective rights of the custodial and noncustodial parent are significant factors that must be considered. However, it recognizes that “it is the rights and needs of the children that must be accorded the greatest weight, since they are innocent victims of their parents’ decision to divorce and are the least equipped to handle the stresses of the changing family situation.”<sup>138</sup> Accordingly, the court concludes that “it serves neither the interests of the children nor the ends of justice to view relocation cases through the prisms of presumptions and threshold tests that artificially skew the analysis in favor of one outcome or another.”<sup>139</sup>

Various other courts have used a best interests of the child analysis in the relocation context, lacking presumptions or thresholds, and allocating to each party an equal burden of proof.<sup>140</sup> The New Mexico Supreme Court in *Jaramillo v.*

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136. *Id.*

137. 665 N.E.2d 145, 150 (N.Y. 1996).

138. *Id.*

139. *Id.* at 151.

140. See, e.g., *In re Marriage of Ciesluk*, 113 P.3d 135, 147 (Colo. 2005) (adopting the reasoning set forth in *Jaramillo* and holding that the constitutional interests of both parents will be best protected if each parent shares equally in the burden of demonstrating how the child’s best interests will be impacted by the proposed relocation); *Fredman v. Fredman*, 960 So.2d 52, 59 (Fla. Dist. Ct. App. 2007) (finding that the court must consider all the statutory factors set forth in section 61.13 of the Florida Statutes without any presumption in favor of either party); *Bodne v. Bodne*, 588 S.E.2d 728, 729 (Ga. 2003) (employing a best interests of the child analysis, and finding that such an analysis “forbids the presumption that a relocating custodial parent will always lose custody and, conversely, forbids any presumption in favor of relocation”); *Fisher v. Fisher*, 137 P.3d 355, 363 (Haw. 2006) (“Mother has a right to [s]on’s legal and physical custody only when it is in [s]on’s best interests.” (quoting *Maeda v. Maeda*, 794 P.2d 268, 270 (Haw. Ct. App. 1999))); *Braun v. Headley*, 750 A.2d 624, 635 (Md. Ct. Spec. App. 2000) ([T]he reasoning of the Supreme Court of New Mexico in *Jaramillo* to be the most cogent

*Jaramillo* found that:

[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 before the court, both parents and children.<sup>141</sup>

Nevertheless, a standard that lacks both burdens and presumptions has endured various criticisms from both courts and scholars.

### B. *Criticisms of the Best Interests of the Child Standard*

Despite its advantages, the best interests of the child standard has generated a substantial amount of criticism.<sup>142</sup> Two common critiques include: (1) the vagueness of the standard complicates divorce negotiations and likely increases the time and expense of litigation; and (2) the standard grants judges too much discretion, risking decisions influenced by personal bias.<sup>143</sup>

Because there are no rigid standards involved in a best interests of the child inquiry, predictability is absent. As a result, critics argue that this reduces the chance of settlement and heightens conflict, since each party "has reason to secure his or her respective advantage, most likely at the expense of cooperation with the other."<sup>144</sup> As each parent attempts to convince the court of who is the better parent, they will thus

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analysis of the appropriate interplay between the constitutional right and the family law concerns. . . ."); *Rittershaus v. Rittershaus*, 730 N.W.2d 262, 269-270 (Mich. Ct. App. 2007) (holding the child to be the primary focus in custody determinations); *Cisneros v. Dingbaum*, 224 S.W.3d 245, 258 (Tex. App. 2005) ("[P]arties both needed to present evidence in support of their position on the child's best interest. . . . In this regard, both parties carry the burden of introducing sufficient evidence for the trial court to make its decision on the best interest of the child.").

141. 823 P.2d 299, 305 (N.M. 1991).

142. For additional criticisms of the best interests standard, see Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 11 (1987), Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 650 (1992), and Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 820-22 (1999).

143. Bartlett, *supra* note 94, at 470.

144. *Id.*

be likely to hire experts to emphasize the other parent's flaws, leading to further alienation between the parents.<sup>145</sup> Additionally, critics contend that there is a high risk of prejudice and bias under the best-interests test because a judge must determine what he or she believes is in the best interests of the child. It is argued that a judge cannot separate deciding what is in a child's best interests from the judge's beliefs about what matters to the child's welfare.<sup>146</sup> As a result, in response to the two criticisms discussed above, courts have moved entirely away from an analysis that focuses on the child, and have resorted to the standards addressed above, which substitute predictability for the child's best interests.

C. *Why the Best Interests of the Child Standard Is Favorable in the Relocation Context*

Despite the numerous criticisms of the best interests of the child test, "[t]here is consensus that the law should seek to promote the child's best interests."<sup>147</sup> Nevertheless, courts, particularly in the relocation context, have resorted to the standards addressed above, which substitute the child's best interests for predictability. "Procedure by presumption is always cheaper and easier than individualized determinations."<sup>148</sup> However, despite the predictability that accompanies the strict standards, the chance of settlement in relocation cases are very slim. The complex interests and disturbing problems that arise in a relocation context are not amiable to settlement negotiation. In the words of the Honorable W. Dennis Dugan, a New York Family Court Judge:

[T]he parental dynamics that surround the issue of relocation . . . makes relocation cases almost impervious to settlement. The reasons for this are obvious. In most cases, the moving parent has painted herself . . . into a corner by the life decisions that she has made before coming to court—like getting married to a man who

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145. *Id.* at 471.

146. Bartlett, *supra* note 52.

147. Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children*, 26 WHITTIER L. REV. 429, 441 (2004).

148. *Jaramillo v. Jaramillo*, 823 P.2d 299, 307 (N.M. 1991) (citing *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).

lives in a distant city. For the nonmoving parent—well, what’s in it for him?<sup>149</sup>

Additionally, in using presumptions or threshold determinations to implement parent-oriented standards, courts run a “risk of duplicating the errors of past gender-stereotyped custody presumptions” and “radically restructuring” the child’s relationship with the disfavored parent.<sup>150</sup> Most significantly, “[a] mechanistic approach treats custody disputes as a zero-sum game in which one parent wins and the other loses.”<sup>151</sup> Furthermore, the *Jaramillo* Court explains that:

When . . . the interests of a third party . . . are not only significantly affected by the outcomes of the litigation but indeed are paramount in determining that outcome, placing on one party the burden of establishing that his or her interests are the ones that should be vindicated can subordinate the interests of the third party . . . in the clash over the other two parties’ competing hopes and desires.<sup>152</sup>

In other words, should the party with the burden of proof fail, the other party wins by default and not necessarily because a victory by that party is in the child’s best interests. Therefore, the only way to give true deference to the actual best interests of the child is to create an analysis, stripped of presumptions or thresholds, which focuses entirely upon the best interests of the child.

Accordingly, while the best interests standard has flaws, it remains the courts’ only reasonable guideline, particularly in the relocation context.<sup>153</sup> The best interests of the child standard “instructs the courts to treat each child, in each family, as an individual.”<sup>154</sup> Critics of the standard are correct about the trade-off between individualized decision and ease of administration of the law.<sup>155</sup> Strict standards are easier to administer, yet the imprecise nature of the best interests standard accu-

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149. The Hon. W. Dennis Duggan, *Rock-Paper-Scissors: Playing the Odds With the Law of Child Relocation*, 45 FAM. CT. REV. 193, 197 (2007).

150. Warshak, *supra* note 119, at 611.

151. *Id.* at 613.

152. *Jaramillo*, 823 P.2d at 307-08.

153. Riggs, *supra* note 91, at 490.

154. Warshak, *supra* note 119, at 612.

155. *Id.*

rately reflects the complicated character of the human family.<sup>156</sup> Suits affecting the parent-child relationship in the relocation context are intensely fact driven. Because no two relocation cases are the same, it is essential that the trial court have the flexibility to deal with unique fact patterns.<sup>157</sup> The best interests of the child test gives courts this flexibility to consider, weigh, and balance numerous factors relevant to the child's well-being, while making the best interests of the child the paramount consideration in relocation disputes.

Nevertheless, because administrative convenience is always favorable, states should adopt contemporary factors that will provide the framework for the court's best interests analysis. Implementing mandatory factors to be considered in adjudicating relocation will help remedy concerns about the standard's imprecision.<sup>158</sup> In creating uniform factors, courts and legislatures may look to social science research. Knowledge gained from such research "can inform judicial education programs and legislative directions that take the form of public policy statements" and, as a result, can elucidate criteria to be considered in defining the child's best interests.<sup>159</sup> As a result, such criteria will provide a more focused and nuanced approach to resolving relocation disputes under a best interests of the child analysis.

#### *D. Model Factors To Be Considered in a Best Interests of the Child Analysis in Relocation Disputes*

There are various factors that should uniformly be considered during a best interests of the child analysis in relocation disputes. These factors should be established either through legislation or through the state high court. The specific, yet non-exhaustive, factors recommended by this paper include: (1) the quality of the relationship between the child and the custodial and noncustodial parent; (2) the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, as well as the feasibility of preserving the relationship between the noncustodial parent and child

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156. Riggs, *supra* note 91, at 490.

157. *Id.*

158. See Warshak, *supra* note 119, at 612.

159. *Id.*

through suitable visitation arrangements; (3) the degree to which the child's life may be enhanced economically, emotionally, educationally, and generally by the move; (4) the reasonable preference of the child, if the child is deemed to be of sufficient intelligence, understanding, and experience to express a preference; (5) the child's attachment to his or her extended family, siblings, school, and community; and (6) the relationship between the custodial and noncustodial parent.<sup>160</sup>

The quality of the relationship between the child and the custodial and noncustodial parent is an extremely important factor, as it determines whether a meaningful relationship exists between the child and one parent or the child and both parents. Additionally, this factor implicitly includes a relaxed approximation element by assuming that the noncustodial parent spends the requisite time with the child to create and maintain a quality relationship. For example, in the *Rogers* case, the court would not perform a rigid calculation of how many hours of caretaking responsibility each parent undertook. Rather, in order to determine the quality of Gerry's relationship with his children, the court would generally look at the relevant fact that Gerry was actively involved in the children's lives without looking at the actual amount of time a week he spent with the children. Unlike an analysis under the strict approximation rule, the fact that Laura may have spent the majority of time with the children would not be dispositive. However, if a noncustodial parent's time with his or her child is lacking in both quality and quantity, this factor weighs in favor of the relocating parent.

On the other hand, should there be a meaningful relationship between the noncustodial parent and the child, such as was the case with Gerry in the *Rogers* case, the impact of the move on the quantity and quality of the child's future contact and relationship with the noncustodial parent, including the feasibility of preserving the relationship through suitable visitation arrangements, is an invaluable factor in the inquiry.<sup>161</sup> For example, a move that is 3.5 hours away is going to make

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160. These factors are a combination of factors mentioned in the various cases cited above. See, e.g., *Jaramillo v. Jaramillo*, 823 P.2d 299, 305-06 (N.M. 1991); *Tropea v. Tropea*, 665 N.E.2d 145, 151 (N.Y. 1996); *Dupre v. Dupre*, 857 A.2d 242, 259 (R.I. 2004); see also FLA. STAT. ANN. § 61.13(3)(d) (West Supp. 2008); MICH. COMP. LAWS ANN. § 722.23 (West 2002).

161. See *supra* note 84.

reasonable visitation more feasible, than a move across the county. In the *Rogers* cases, Indiana is over one thousand miles from Texas, a factor that, given the children's close relationship with Gerry, may weigh against Laura's relocation.

In addition to considering the child's relationship with the noncustodial parent, it is extremely important that the court consider the child's relationship with his or her primary custodian, including the degree to which the child's life may be enhanced economically, emotionally, educationally, and generally by the move with his or her primary custodian. The court must determine, based on the relationship between the child and the primary custodian, how intertwined their interests are, i.e., if the primary custodian's life is made better by the move, will the child's life necessarily be bettered by relocation.<sup>162</sup> At this point, the court would also consider the child's attachment to his or her extended family, siblings, school, and community, and how that may detract from the benefit of the move. We do not have the relevant details in the *Rogers* case to discuss these factors, but it would most likely be a close call as to which parent this factor weighs in favor of.

It is also important for a court to look into the relationship between the custodial and noncustodial parent, as the cooperative interaction of the parents is critical to the child's healthy development and peace of mind. The high potential for continued or re-opened conflict, as may be present in the relocation context, can severely threaten the child's sense of security.<sup>163</sup> Finally, it is important for the court to give reasonable inquiry into the preference of the child, if the child is deemed to be of sufficient intelligence, understanding, and experience to express a preference.<sup>164</sup>

As mentioned above this list is non-exhaustive. However, there is a specific factor that has been intentionally left out of the above list: the motives of the parents in either relocation or

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162. See *supra* note 45.

163. Wallerstein & Tanke, *supra* note 13, at 311.

164. *Id.* at 321-22. According to Wallerstein & Tanke, children's "voices should be heard by sensitive, well-trained persons who are independent of the self-interests of parents and other participants in the judicial process. In this instance, the goals and objectives of the adversarial process are less important than a nonthreatening forum for the child—one in which he or she can express views and feelings privately and in confidence, and without fear of adverse consequences." *Id.* at 322.

in opposing the relocation.<sup>165</sup> This paper has consistently rejected parent-oriented standards, in favor of a standard that focuses on what is best for the child. Accordingly, a factor considering whether a parent is moving in good faith has little to do with whether the move will ultimately be in a child's best interests.<sup>166</sup>

#### IV. CONCLUSION

A child's fate should not be determined through mechanical, parent-oriented standards, which focus on the competing interests of the parents. Rather, in relocation disputes the paramount inquiry must be the best interests of the child. A best interests standard avoids presumptions and threshold inquiries. Such inquiries are often structured upon broad generalizations regarding whether a child is generally better suited by a relationship with one or both parents, generalizations that are often based upon conflicting, and possibly problematic, social science research. In contrast, the best interests standard allows courts to refer to scholarly research to gain a better understanding of the interests at issue, but gives the court the flexibility to make appropriately individualized determinations that focus on a particular child's well-being. Although the standard has been criticized for lacking predictability in adjudication, courts can address predictability concerns by creating mandatory factors, such as those discussed above, to consider when performing a best interests analysis. Moreover, as mentioned above, the imprecise nature of the best interests standard accurately reflects the complicated character of the human family.<sup>167</sup>

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165. *Tropea*, 665 N.E.2d at 150.

166. For example, if a move is against a child's best interests, it most likely will be based on one of the factors above, as opposed to the motive a parent had in moving. Moreover, if a parent wants to move in bad faith, but the child does not have an ongoing, quality relationship with the noncustodial parent, the relocating motives are irrelevant.

167. *Riggs*, *supra* note 91, at 490.