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Peter Ted Surace

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A PROPOSED "BEST INTERESTS" TEST FOR REMOVING A CHILD FROM THE JURISDICTION OF THE NONCUSTODIAL PARENT

INTRODUCTION

Awards of child custody are generally accompanied by a visitation provision for the noncustodial parent.¹ Visitation may be curtailed, however, and even extinguished, when the custodial parent proposes to move with the child to another jurisdiction.² Recognizing that the

1. Typically, the custodial parent is the mother. H. Clark, *The Law of Domestic Relations in the United States* §17.4, at 590 (1968); Doudna, *The Weekend Mother*, N.Y. Times, Oct. 3, 1982, § 6 (Magazine), at 72, col. 5. While recognizing the prevalence of custody awards to mothers, this Note also recognizes the emerging phenomenon of mothers without custody. See Doudna, *supra*, at 75, 84 (discussing instances in which mothers involuntarily lost custody of children); Manuel, *Mothers without custody: a painful decision*, Christian Sci. Monitor, Sept. 13, 1982, at 18, col. 3 (discussing consequences experienced by mother who voluntarily relinquished court-ordered custody). Thus, unlike other commentary, which use the terms "non-custodial father" and "custodial mother" to mirror the typical alignment of parties in custody matters, this Note adopts the more general terms "noncustodial parent" and "custodial parent," unless the context requires an identification of the gender of the parent.

2. Because of career opportunities, the greater ease with which mobility can be achieved in modern society, see *infra* note 24, and the obligations that a remarriage may entail, see, e.g., Clark v. Clark, 46 Ala. App. 432, 434, 243 So. 2d 517, 518 (Civ. App. 1970) (second husband stationed in Germany with military); *In re Marriage of Feliciano*, 103 Ill. App. 3d 666, 668, 431 N.E.2d 1120, 1122 (1981) (second husband secured employment in Tennessee as truck driver); *Cmaylo v. Cmaylo*, 76 A.D.2d 898, 898-99, 429 N.Y.S.2d 44, 45 (second husband involuntarily transferred to Texas by employer), *appeal dismissed*, 51 N.Y.2d 770 (1980); *Burich v. Burich*, 314 N.W.2d 82, 88 (N.D. 1981) (second husband moved to Kansas to pursue work in oil business); *Culberson v. Culberson*, 60 Ohio App. 2d 304, 305, 397 N.E.2d 1226, 1227 (1978) (per curiam) (second husband assigned to military post in Germany), the custodial parent is not always satisfied to remain in the jurisdiction of the noncustodial parent. See *infra* pt. I(B)(1).

The custodial parent's proposed relocation may be to a different locale within the home state, see, e.g., *Bernick v. Bernick*, 31 Colo. App. 485, 486, 505 P.2d 14, 15 (1972); *Dean v. Dean*, 79 A.D.2d 876, 876, 436 N.Y.S.2d 1019, 1019 (1980), to another state, see, e.g., *Middlekauff v. Middlekauff*, 161 N.J. Super. 84, 86, 390 A.2d 1202, 1203 (App. Div. 1978); *Fritschler v. Fritschler*, 60 Wis. 2d 283, 285, 208 N.W.2d 336, 338 (1973), or to a foreign country. *Daghir v. Daghir*, 82 A.D.2d 191, 192, 441 N.Y.S.2d 494, 495 (1981), *aff'd*, 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982); *In re Marriage of Ditto*, 52 Or. App. 609, 611, 628 P.2d 777, 778 (1981). This Note avoids the term "removal from a state," and instead uses the term "removal from a jurisdiction," because the custodial parent can conceivably propose to move the child to a point within the state so distant from the noncustodial parent's residence as to frustrate frequent and regular visitation. But see *Bernick v. Bernick*, 31 Colo. App. 485, 486, 505 P.2d 14, 15 (1972) (move of 140 miles to another town in Colorado allowed); *Dean v. Dean*, 79 A.D.2d 876, 876, 436 N.Y.S.2d 1019, 1019 (1980) (move of some 400 miles within New York allowed).

custodial parent's relocation might impair the opportunity to visit the child, the noncustodial parent may oppose the move.³ Whether a court will then permit removal of the child from the jurisdiction depends on its determination of the "best interests" of the child.⁴

This Note argues that a child's best interests are safeguarded only if the custodial parent is required to satisfy a heavy evidentiary burden.⁵ After examining the right of visitation and its exercise when the

3. See *infra* pt. I(B)(2).

4. See H. Clark, *supra* note 1, § 17.4, at 587 (interference with right of visitation is small price to pay for welfare of child if his welfare would be augmented by removal); cf. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226, 255 (Summer 1975) (in resolving custody dispute, judge must choose alternative that "maximizes" what is best for particular child). Courts have not specifically defined the term "best interests" in the context of removal. See, e.g., *Tanttila v. Tanttila*, 152 Colo. 445, 453, 382 P.2d 798, 802 (1963) (McWilliams, J., dissenting); *Hale v. Hale*, 1981 Mass. App. Ct. Adv. Sh. 2117, 2120-21, 429 N.E.2d 340, 343 (1981); *In re Marriage of Meier*, 286 Or. 437, 447, 595 P.2d 474, 479 (1979); cf. Comment, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 Yale L.J. 151, 153-54 (1963) (speculating that in the field of custody adjudication the "best interests" standard "may be unworkable or a mere cloak for the operation of judicial intuition") [hereinafter cited as *Alternatives*].

Some commentators have analyzed the issue, which is beyond the scope of this Note, of removal in the context of the custodial parent's right to travel. E.g., Comment, *Restrictions on a Parent's Right to Travel in Child Custody Cases: Possible Constitutional Questions*, 6 U.C.D. L. Rev. 181 (1973) [hereinafter cited as *Right to Travel*]; Note, *Residence Restrictions on Custodial Parents: Implications for the Right to Travel*, 12 Rutgers L.J. 341 (1981) [hereinafter cited as *Residence Restrictions*]. These commentators argue that a state overcomes the constitutional challenge only when circumstances indicate that removal would be harmful to the child. *Right to Travel, supra*, at 191; *Residence Restrictions, supra*, at 360.

5. For example, the custodial parent as petitioner begins the process of proof by producing evidence that the move would be in the best interests of the child. See G. Lilly, *An Introduction to the Law of Evidence* § 15, at 43-44 (1978). After satisfying this so-called "burden of production," the burden of producing evidence shifts to the noncustodial parent, who then introduces evidence that the move would be detrimental to the best interests of the child. See *id.* at 45. If the trier of fact decides, after both sides have been heard, that it is "more probable than not" that the proposed move would be in the best interests of the child, see *id.* at 41, then the petitioning custodial parent has met the "burden of persuasion," which that parent has carried since the commencement of the proceeding. See *id.* Consequently, removal will be permitted. Possibly, after all the evidence has been introduced, the child's best interests will appear to be served as well by continued residency in the jurisdiction as by removal. If the evidence is in this state of equipoise, the petitioning custodial parent has failed to satisfy the burden of persuasion, see *id.* at 47, and thus removal must be prohibited. For a detailed analysis of the mechanics of evidentiary burdens, see F. James & G. Hazard, *Civil Procedure* §§ 7.5-.8 (2d ed. 1977); C. McCormick, *McCormick's Handbook of the Law of Evidence* §§ 336-339 (E. Cleary 2d rev. ed. 1972). The practice in the literature, which is to have the term "burden of proof" encompass the terms "burden of production" and "burden of persuasion," is not followed here because clarity of expression dictates that the two burdens be isolated from each other.

divorced parents continue to live in the same jurisdiction, Part I explores the custodial parent's possible reasons for relocation, the noncustodial parent's interest in preventing it, and the effect that relocation may have on the child's relationship with the noncustodial parent. With this background, Part II assesses the tests that appellate courts in four states have devised for use in removal cases.⁶ Finally, Part III sets forth certain modifications of the New York "exceptional circumstances" test to arrive at a model test to assist trial judges in removal determinations.

I. THE RIGHT OF VISITATION AND THE IMPLICATIONS OF REMOVAL

A. Visitation

Visitation is crucial to the psychological well-being of a child because it allows him to continue to receive the love and support of the noncustodial parent.⁷ Accordingly, courts tend to equate visitation

6. While courts typically apply the "best interests" standard to removal determinations, see *infra* text accompanying notes 53-55, an analysis of the case law since 1956 reveals that only seven states have adopted what may be characterized as removal tests—that is, tests providing an analytical framework within which such determinations can be made. Of these seven states, only four—New York, New Jersey, Illinois and Colorado—have developed tests to a point such that they are sufficiently representative of the spectrum of approaches to removal determinations. See *infra* pt. II. Each of the tests of the other three states—California, Massachusetts and Minnesota—bears a strong resemblance to a test of one of the four major states, and therefore none is discussed extensively herein. See *Dozier v. Dozier*, 167 Cal. App. 2d 714, 719, 334 P.2d 957, 961 (1959) (court's consideration of "real financial, employment, educational, health, or housing" factors, resembling New York's "exceptional circumstances" test); *Hale v. Hale*, 1981 Mass. App. Ct. Adv. Sh. 2117, 2122, 429 N.E.2d 340, 343 (1981) (court noting its state's lack of removal test, and turning for guidance to New Jersey's removal test); *Smith v. Smith*, 282 Minn. 190, 195, 163 N.W.2d 852, 857 (1968) (court's consideration of "[u]nusual circumstances which alone or in combination with other facts may justify . . . an unconsented-to removal," resembling New York's "exceptional circumstances" test).

7. *E.g.*, *Weiss v. Weiss*, 52 N.Y.2d 170, 175, 418 N.E.2d 377, 380, 436 N.Y.S.2d 862, 865 (1981) (fact that custody is placed in one parent does not necessarily terminate role of other as "psychological guardian and preceptor"); *Daghir v. Daghir*, 82 A.D.2d 191, 194, 441 N.Y.S.2d 494, 496 (1981) (visitation allows noncustodial parent to "provide [the] child with the guidance and counsel youngsters require in their formative years . . . [and to] be an available source of comfort and solace in times of [the] child's need"), *aff'd*, 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982); Comment, *Post-Divorce Visitation: A Study in the Deprivation of Rights*, 27 De Paul L. Rev. 113, 123 (1977) ("The support, interest and continuing love of the absent parent is vital to the psychological well-being of the child.") [hereinafter cited as *Post-Divorce Visitation*]; Note, *The California Custody Decree*, 13 Stan. L. Rev. 108, 114 (1960) (contact with both parents is desirable for child's emotional growth, and identification with both parents is essential in evolving mature conscience in child) [hereinafter cited as *California Custody*]. Visitation often helps relieve the child of the feeling of abandonment that may haunt him after a

with the best interests of the child.⁸ In fact, courts so vigilantly protect the continuing association of the noncustodial parent and the

divorce. Bruch, *Making Visitation Work: Dual Parenting Orders—New Perspectives on the Traditional Tug-of-War*, Fam. Advoc. 22, 26 (Summer 1978); see *McManus v. McManus*, 38 Ill. App. 3d 645, 647, 348 N.E.2d 507, 509 (1976) (liberal visitation given to noncustodial parent so that child will not become estranged from that parent); *Post-Divorce Visitation*, *supra*, at 114 (welfare of child requires liberal visitation so that he will not become estranged from noncustodial parent); *Residence Restrictions*, *supra* note 4, at 359 (“[A]lternative arrangements in lieu of weekly visits may involve a significant loosening of family ties.”).

8. *E.g.*, *Hailey v. Hailey*, 513 P.2d 473, 474 (Colo. Ct. App. 1973); *McManus v. McManus*, 38 Ill. App. 3d 645, 647, 348 N.E.2d 507, 509 (1976); *Donovan v. Donovan*, 212 N.W.2d 451, 453 (Iowa 1973); *Burich v. Burich*, 314 N.W.2d 82, 86 (N.D. 1981); Henszey, *Visitation by a Non-Custodial Parent: What is the “Best Interest” Doctrine?*, 15 J. Fam. L. 213, 214 (1976-1977); *Post-Divorce Visitation*, *supra* note 7, at 114. Courts can grant three possible types of visitation awards. They are: 1) “reasonable” visitation, in which the divorced parents arrange the timing of the visitation between themselves; 2) specified visitation, which designates the dates, times and places for visitation; and 3) visitation that is left to the discretion of the custodial parent. *Post-Divorce Visitation*, *supra* note 7, at 115. Both “reasonable” and specified visitation have their drawbacks. The indefiniteness inherent in “reasonable” visitation awards leaves room for a custodial parent to be uncooperative. Similarly, the inflexibility of specified visitation awards hinders the parents’ ability to adjust visitation schedules as the need arises. See *California Custody*, *supra* note 7, at 113. The value of an award of specified visitation, however, is its resolution of a potentially recurring dispute between the parents. Johnson, *Visitation: When Access Becomes Excess*, Fam. Advoc. 14, 16 (Summer 1978). Such an arrangement becomes a necessity if the divorced parents are unable to resolve matters of visitation between themselves. See *Post-Divorce Visitation*, *supra* note 7, at 115. For illustrations of specified and “reasonable” visitation awards, see Johnson, *supra*, at 15-17.

The view that visitation should be left to the discretion of the custodial parent has not yet been adopted by the courts, *Post-Divorce Visitation*, *supra* note 7, at 115; see, e.g., *Burich v. Burich*, 314 N.W.2d 82, 86-87 (N.D. 1981) (commenting on discussion of importance of visitation to child in *Gardebring v. Rizzo*, 269 N.W.2d 104, 110 (N.D. 1978)), but has been advocated in a noted psychological study of the children of divorced parents. J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* (1973). The authors of that work conclude that to protect the ongoing relationship between the custodial parent and the child, “the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits.” *Id.* at 38. This position was criticized by a reviewer as encouraging spiteful behavior, blackmail and extortion by the custodial parent. Foster, Book Review, 12 *Willamette L.J.* 545, 551 (1976). In only recognizing the value of the relationship between the child and the custodial parent, it ignores the child’s need for a continuing association with the noncustodial parent. *Post-Divorce Visitation*, *supra* note 7, at 116.

The view that post-divorce visitation serves the best interests of the child is generally consistent with sociological studies. See, e.g., J. Despert, *Children of Divorce* 69-73 (1953); J. Wallerstein & J. Kelly, *Surviving the Breakup* 123, 131, 315 (1980). It has even been raised to the level of public policy by state courts that encourage the maintenance of close interfamily relationships in post-divorce situations. See, e.g., *In re Marriage of Murga*, 103 Cal. App. 3d 498, 502-03, 163 Cal.

child that interference with or frustration of visitation by the custodial parent may prompt courts to transfer custody from that parent to the other.⁹

Notwithstanding the importance of visitation, the noncustodial parent's right to exercise it is not absolute.¹⁰ Decisions relative to visitation must serve the best interests of the child.¹¹ Therefore, visitation must be thought of "primarily [as the] right of the [child] and secondarily [as the] right of the non-custodial parent."¹² The latter may

Rptr. 79, 80 (1980); *Frail v. Frail*, 54 Ill. App. 3d 1013, 1015, 370 N.E.2d 303, 304 (1977); *Entwistle v. Entwistle*, 61 A.D.2d 380, 384-85, 402 N.Y.S.2d 213, 216, *appeal dismissed*, 44 N.Y.2d 851 (1978); *Commonwealth ex rel. Lotz v. Lotz*, 188 Pa. Super. 241, 244, 146 A.2d 362, 363-64 (1958), *aff'd per curiam*, 396 Pa. 287, 152 A.2d 663 (1959). Because visitation is deemed so important to the welfare of the child, it is generally granted to the noncustodial parent by the courts as a matter of course. *Weiss v. Weiss*, 52 N.Y.2d 170, 175, 418 N.E.2d 377, 380, 436 N.Y.S.2d 862, 865 (1981); H. Clark, *supra* note 1, § 17.4, at 590; see *Post-Divorce Visitation*, *supra* note 7, at 123. The preservation of visitation rights, which are generally considered basic natural rights, is not conditioned on their being set out in a separation agreement or decree of divorce. *Strahl v. Strahl*, 66 A.D.2d 571, 576, 414 N.Y.S.2d 184, 187 (1979), *aff'd*, 49 N.Y.2d 1036, 407 N.E.2d 479, 429 N.Y.S.2d 635 (1980); *Denberg v. Denberg*, 34 Misc. 2d 980, 985-86, 229 N.Y.S.2d 831, 837 (Sup. Ct. 1962); Comment, *Article 4639a—Custody, Support and Visitation Re: Suits to Have These Rights Changed, Modified or Enforced*, 22 Baylor L. Rev. 497, 497 (1970) [hereinafter cited as *Custody, Support & Visitation*]; *California Custody*, *supra* note 7, at 113; see 2 W. Nelson, *Nelson on Divorce and Annulment with Selected Forms* § 15.26, at 274-75 (2d ed. 1961). In the absence of a provision on visitation, the noncustodial parent may visit the child at reasonable times and places. *Custody, Support & Visitation*, *supra*, at 497.

9. See, e.g., *Pelts v. Pelts*, 425 S.W.2d 269, 270 (Mo. Ct. App. 1968); *Daghir v. Daghir*, 82 A.D.2d 191, 196, 441 N.Y.S.2d 494, 497 (1981), *aff'd*, 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982); *In re Marriage of Meier*, 286 Or. 437, 441-42, 595 P.2d 474, 476 (1979); *Wood v. Wood*, 510 S.W.2d 399, 400 (Tex. Civ. App. 1974); *Fritschler v. Fritschler*, 60 Wis. 2d 283, 285, 290, 208 N.W.2d 336, 337, 339-40 (1973).

10. *Raymond v. Raymond*, 165 Conn. 735, 741, 345 A.2d 48, 52 (1974); *Krause v. Krause*, 58 Wis. 2d 499, 512, 206 N.W.2d 589, 596 (1973); see *In re Marriage of Lower*, 269 N.W.2d 822, 827 (Iowa 1978) (en banc); *Hutchins v. Hutchins*, 84 Mich. App. 236, 239, 269 N.W.2d 539, 540 (1978); 2 W. Nelson, *supra* note 8, § 15.26, at 274-75. One commentator states that the so-called parental visitation right or privilege is no more than a claim because visitation will be denied if it promises to be detrimental to the child's best interests. Henszey, *supra* note 8, at 214; cf. *Salaices v. Sabraw*, 400 F. Supp. 367 (N.D. Cal. 1975) (raising but not deciding issue of whether children have constitutional right not to visit noncustodial parent), *remanded mem.*, 571 F.2d 588 (9th Cir. 1978). See *infra* note 13 and accompanying text.

11. *Bernick v. Bernick*, 31 Colo. App. 485, 487, 505 P.2d 14, 15 (1972); *accord In re Marriage of Lower*, 269 N.W.2d 822, 827 (Iowa 1978) (en banc); *Weiss v. Weiss*, 52 N.Y.2d 170, 174-75, 418 N.E.2d 377, 379-80, 436 N.Y.S.2d 862, 865 (1981); *Fritschler v. Fritschler*, 60 Wis. 2d 283, 289, 208 N.W.2d 336, 339 (1973).

12. *Bernick v. Bernick*, 31 Colo. App. 485, 487, 505 P.2d 14, 15 (1972); see *In re Marriage of Lower*, 269 N.W.2d 822, 827 (Iowa 1978) (en banc) (noncustodial parent's visitation rights are derivative from child's best interests).

forfeit the right by conduct, or may be deprived of it if its exercise would be harmful to the child's welfare.¹³

To provide a positive experience for the child, visitation must be frequent and regular.¹⁴ When the child and noncustodial parent live close to each other, courts have generally allowed such visitation in order to maintain the child's relationship with that parent.¹⁵ Even when the parties arrange the dates, times and places of visitation

13. *Strahl v. Strahl*, 66 A.D.2d 571, 574, 414 N.Y.S.2d 184, 186 (1979), *aff'd*, 49 N.Y.2d 1036, 407 N.E.2d 479, 429 N.Y.S.2d 635 (1980); 2 W. Nelson, *supra* note 8, § 15.26, at 275. For a detailed discussion of circumstances under which visitation may be denied, see *Post-Divorce Visitation*, *supra* note 7, at 116-23. The noncustodial parent's failure to take full advantage of visitation rights does not constitute a forfeiture. See *Strahl v. Strahl*, 66 A.D.2d 571, 577, 414 N.Y.S.2d 184, 187 (1979) (test is whether noncustodial parent has "sincere desire to be in the company of the children and has had a close, continuous and meaningful association with them over a significant period of time"), *aff'd*, 49 N.Y.2d 1036, 407 N.E.2d 479, 429 N.Y.S.2d 635 (1980).

14. *Daghir v. Daghir*, 82 A.D.2d 191, 194, 441 N.Y.S.2d 494, 496 (1981), *aff'd*, 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982); see *In re Marriage of Murga*, 103 Cal. App. 3d 498, 502-03, 163 Cal. Rptr. 79, 80 (1980); *Felton v. Felton*, 1981 Mass. Adv. Sh. 779, 781, 418 N.E.2d 606, 607 (1981); *Martinez v. Konczewski*, 85 A.D.2d 717, 717, 445 N.Y.S.2d 844, 845 (1981); *Fritschler v. Fritschler*, 60 Wis. 2d 283, 289, 208 N.W.2d 336, 339 (1973); *Balbirer, Rights and Obligations of Custodial and Non-custodial Parents in Connecticut*, 53 Conn. B.J. 356, 364 (1979); *Bruch, supra* note 7, at 26.

15. See, e.g., *In re Marriage of Murga*, 103 Cal. App. 3d 498, 501, 163 Cal. Rptr. 79, 79 (1980) (decreed visitation on alternate weekends, specified holidays, one week each summer and one week prior to Christmas Eve); *In re Marriage of Lower*, 269 N.W.2d 822, 823 (Iowa 1978) (en banc) (decreed visitation on alternate weekends and several weeks in summer); *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 206, 365 A.2d 27, 30 (Ch. Div.) (court noting generally held view that some variation of weekly visitation is most consistent with maintaining parental relationship), *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976); *Weiss v. Weiss*, 52 N.Y.2d 170, 173, 418 N.E.2d 377, 378-79, 436 N.Y.S.2d 862, 864 (1981) (decreed visitation of one weekday afternoon each week, alternate weekends, alternate Easter and Christmas holidays and two continuous weeks during summer); *In re Marriage of Meier*, 286 Or. 437, 439, 595 P.2d 474, 475 (1979) (decreed visitation of alternate weekends, one weekday evening during intervening weeks, three weeks during summer and reasonable sharing of holidays); *Whitman v. Whitman*, 28 Wis. 2d 50, 52, 135 N.W.2d 835, 836 (1965) (decreed visitation of one visit per week upon 24 hours notice, at least two days during Christmas holidays and one month during summer); *H. Clark, supra* note 1, § 17.4(g), at 590 (noting common practice of courts to allow noncustodial parent to have child on weekends and during school vacations); cf. *Jenkins v. Jenkins*, 395 So. 2d 1045, 1046 (Ala. Civ. App. 1981) (decree allowing liberal visitation); *Scheiner v. Scheiner*, 336 So. 2d 406, 407 (Fla. Dist. Ct. App. 1976) (decree of liberal visitation at reasonable times and places after reasonable notice); *Jafari v. Jafari*, 204 Neb. 622, 623, 284 N.W.2d 554, 555 (1979) (decree allowing liberal visitation); *Weber v. Weber*, 84 A.D.2d 940, 940, 446 N.Y.S.2d 676, 676 (1981) (same).

pursuant to a decree of "reasonable" visitation,¹⁶ they often settle on a weekly arrangement.¹⁷ Alternative arrangements in lieu of weekly visitation may aggravate an already difficult situation occasioned by the divorce¹⁸ and result in the estrangement of the child from the noncustodial parent and the loss of that parent's guiding role in the child's life.¹⁹

B. Removal

With increasing frequency, custodial parents wish to move with their children from the jurisdiction of the noncustodial parent.²⁰ The crux of the conflict that usually arises between the divorced parents is aptly posited by one commentator:

There is no more effective way of preventing a non-custodial [parent] from seeing his child than to remove it to a distant point. Of what practical use to a [noncustodial parent] are his visitation rights . . . if he has to go hundreds, if not thousands, of miles to exercise them? On the other hand, would it not be unconscionable if the custodial [parent], to preserve the [other's] rights, was tethered to one place permanently, regardless of legitimate imperatives to move?²¹

The resolution of the parents' competing interests²² depends upon a determination of whether removal of the child to another jurisdiction will promote his best interests.²³

16. See *Post-Divorce Visitation*, *supra* note 7, at 115 (under "reasonable" visitation award, divorced parents schedule visitation periods "to their mutual convenience"). But see *California Custody*, *supra* note 7, at 113 (defining "reasonable" visitation as right to see child at all times convenient to custodial parent).

17. See, e.g., *Clark v. Clark*, 46 Ala. App. 432, 433-34, 243 So. 2d 517, 518 (Civ. App. 1970); *In re Marriage of Szamocki*, 47 Cal. App. 3d 812, 814, 121 Cal. Rptr. 231, 232 (1975); *Gray v. Gray*, 57 Ill. App. 3d 1, 2-3, 372 N.E.2d 909, 910-11 (1978); *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 203, 206, 365 A.2d 27, 28, 30 (Ch. Div.), *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976).

18. See *Residence Restrictions*, *supra* note 4, at 359.

19. See *supra* note 7 and accompanying text.

20. See *In re Marriage of Lower*, 269 N.W.2d 822, 826 (Iowa 1978) (en banc); *Pattison v. Pattison*, 208 So. 2d 395, 396 (La. Ct. App. 1968); *Nedrow v. Nedrow*, 48 Wash. 2d 243, 249, 292 P.2d 872, 875 (1956); *Balbirer*, *supra* note 14, at 364; *Bodenheimer, Equal Rights, Visitation, and the Right to Move*, *Fam. Advoc.* 18, 20 (Summer 1978). See *infra* text accompanying notes 24-30 for a discussion of the various factors that may bear on a custodial parent's decision to relocate.

21. 1 A. Lindey, *Separation Agreements and Ante-Nuptial Contracts* § 14, at 14-81 (rev. ed. 1982).

22. Courts have been subject to the criticism that, in determining the welfare of the child, they give too much weight to the competing rights and interests of the parents. See *Weiss v. Weiss*, 52 N.Y.2d 170, 174-75, 418 N.E.2d 377, 379-80, 436 N.Y.S.2d 862, 865 (1981); *Whitman v. Whitman*, 28 Wis. 2d 50, 63-64, 135 N.W.2d 835, 842 (1965) (Hallows, J., dissenting); *Drinan, The Rights of Children in Modern American Family Law*, 2 J. Fam. L. 101, 105, 109 (1962). The fact is, however, that

1. The Custodial Parent's Interest in Removal

The custodial parent may wish to move²⁴ in order to search for employment²⁵ or to begin a job already obtained.²⁶ If remarried, he or she would ordinarily like to accompany the second spouse when the latter's employment requires a move to another jurisdiction.²⁷ A proposed move may be to a location closer to the custodial parent's own family, which may provide the parent with psychological security and assist in the upbringing of the child.²⁸ Health²⁹ or educa-

the rights of the child cannot be exercised independently of his parents. *Id.* at 105; see *Whitman v. Whitman*, 28 Wis. 2d 50, 64, 135 N.W.2d 835, 842 (1965) (Hallows, J., dissenting) ("[T]he law has not yet developed to the point where the rights of the children of divorces are recognized independently from those of the parents."). Nevertheless, the child's best interests require "that the interest[s] of others be realized." See Sayre, *Awarding Custody of Children*, 9 U. Chi. L. Rev. 672, 684 (1942). See *infra* pt. II(A)-(D) and accompanying text.

23. See *Hale v. Hale*, 1981 Mass. App. Ct. Adv. Sh. 2117, 2120, 429 N.E.2d 340, 342-43 (1981); *Burich v. Burich*, 314 N.W.2d 82, 85 (N.D. 1981); *In re Marriage of Meier*, 286 Or. 437, 445-46, 595 P.2d 474, 478 (1979); *Fritschler v. Fritschler*, 60 Wis. 2d 283, 287, 208 N.W.2d 336, 338 (1973). While some states have statutes that are to be applied to removal determinations, e.g., Ill. Ann. Stat. ch. 40, § 609 (Smith-Hurd Supp. 1982-1983); Mass. Ann. Laws ch. 208, § 30 (Michie/Law. Co-op. 1981), the variation in the case law "is more dependent on the factors considered important by the court than on the wording of the relevant statute, if any." *Hale v. Hale*, 1981 Mass. App. Ct. Adv. Sh. 2117, 2122 n.7, 429 N.E.2d 340, 343 n.7 (1981).

24. Some courts have taken notice of the easy mobility in today's society and the consequent impracticality of confining a custodial parent to a limited geographical area. *Pattison v. Pattison*, 208 So. 2d 395, 396 (La. Ct. App. 1968), cited with approval in *In re Marriage of Lower*, 269 N.W.2d 822, 826 (Iowa 1978) (en banc); see *Gray v. Gray*, 57 Ill. App. 3d 1, 6, 372 N.E.2d 909, 913 (1978).

The discussion in this Note presumes that the custodial parent's reasons for wanting to move are legitimate. Removal will be denied in those cases in which the reasons for relocation are proven to be vindictive. See Henszey, *supra* note 8, at 221.

25. See, e.g., *In re Marriage of Young*, 529 P.2d 344, 345 (Colo. Ct. App. 1974); *Weiss v. Weiss*, 52 N.Y.2d 170, 173, 418 N.E.2d 377, 379, 436 N.Y.S.2d 862, 864 (1981); *Lebowitz v. Lebowitz*, 403 S.W.2d 871, 876 (Tex. Civ. App. 1966); *Fritschler v. Fritschler*, 60 Wis. 2d 283, 287, 208 N.W.2d 336, 338 (1973).

26. See, e.g., *Gray v. Gray*, 57 Ill. App. 3d 1, 3, 372 N.E.2d 909, 911 (1978); *Broomfield v. Broomfield*, 283 So. 2d 839, 840 (La. Ct. App. 1973); *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 209-10, 365 A.2d 27, 31-32 (Ch. Div.), *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976); *Priebe v. Priebe*, 81 A.D.2d 746, 747, 438 N.Y.S.2d 413, 414 (1981), *aff'd*, 55 N.Y.2d 997, 434 N.E.2d 708, 449 N.Y.S.2d 472 (1982).

27. See, e.g., *In re Marriage of Feliciano*, 103 Ill. App. 3d 666, 667-68, 431 N.E.2d 1120, 1122 (1981); *Cmaylo v. Cmaylo*, 76 A.D.2d 898, 898-99, 429 N.Y.S.2d 44, 45, *appeal dismissed*, 51 N.Y.2d 770 (1980); *Burich v. Burich*, 314 N.W.2d 82, 87 (N.D. 1981); *In re Marriage of Ditto*, 52 Or. App. 609, 613-14, 628 P.2d 777, 779 (1981).

28. See, e.g., *In re Marriage of Young*, 529 P.2d 344, 345 (Colo. Ct. App. 1974); *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 210, 365 A.2d 27, 32 (Ch. Div.), *aff'd*

tional³⁰ considerations of either the custodial parent or the child may constitute yet other cogent reasons for relocation.

Assuming there is no statute to the contrary and the divorce decree does not contain a residence restriction, the custodial parent is not required to obtain court approval to remove the child from the jurisdiction,³¹ even though the relocation may interfere with previously decreed visitation rights.³² When the decree does contain a residence restriction, which is sometimes included to ensure compliance with the visitation arrangement that the court has ordered,³³ its provisions generally require that the custodial parent obtain either the permission of the court or that of the other parent prior to relocating with the

per curiam, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976); *In re Marriage of Meier*, 286 Or. 437, 440, 595 P.2d 474, 476 (1979); *Bolenbaugh v. Bolenbaugh*, 89 S.D. 639, 642, 237 N.W.2d 12, 14 (1975).

29. *Compare* *Tandy v. Tandy*, 42 Ill. App. 3d 87, 90, 355 N.E.2d 585, 588 (1976) (child's health) and *Nash v. Nash*, 236 A.D. 89, 89, 258 N.Y.S. 313, 313 (1932) (*per curiam*) (same), *aff'd*, 261 N.Y. 579, 185 N.E. 746 (1933) with *Sipos v. Sipos*, 73 A.D.2d 1055, 1056, 425 N.Y.S.2d 414, 416 (1980) (custodial parent's health) and *Deutsch v. Deutsch*, 53 A.D.2d 861, 862, 385 N.Y.S.2d 357, 357 (1976) (same).

30. *See, e.g.*, *Middlekauff v. Middlekauff*, 161 N.J. Super. 84, 94, 390 A.2d 1202, 1207 (App. Div. 1978) (custodial parent's education); *Weiss v. Weiss*, 52 N.Y.2d 170, 177, 418 N.E.2d 377, 381, 436 N.Y.S.2d 862, 866 (1981) (custodial parent's or child's education); *Harris v. Harris*, 57 Misc. 2d 672, 674, 293 N.Y.S.2d 592, 595 (Fam. Ct. 1968) (custodial parent's education); *Bolenbaugh v. Bolenbaugh*, 89 S.D. 639, 642, 237 N.W.2d 12, 14 (1975) (same). *But cf.* *Gray v. Gray*, 57 Ill. App. 3d 1, 5-6, 372 N.E.2d 909, 913 (1978) (lack of programs or facilities in other jurisdiction comparable to those presently needed and enjoyed by child could provide basis for denying removal).

31. *See* *Inman v. Inman*, 370 So. 2d 1037, 1039 (Ala. Civ. App. 1979); *In re Marriage of Lower*, 269 N.W.2d 822, 825 (Iowa 1978) (en banc); *In re Marriage of Smith*, 290 Or. 567, 571, 624 P.2d 114, 116 (1981); *Ehrich v. Ehrich*, 7 Wash. App. 275, 278, 499 P.2d 216, 218 (1972); *H. Clark, supra* note 1, § 17.4, at 587; 2 *W. Nelson, supra* note 8, § 15.20, at 267. It has been suggested, however, that even in the absence of a statute or residency clause, the party awarded custody should seek leave of the court to take the child out of the jurisdiction, *id.*; *see In re Marriage of Szamocki*, 47 Cal. App. 3d 812, 818, 121 Cal. Rptr. 231, 234 (1975); *Ernst v. Ernst*, 214 Cal. App. 2d 174, 179, 29 Cal. Rptr. 478, 481 (1963); *In re Marriage of Lower*, 269 N.W.2d 822, 825 (Iowa 1978) (en banc), as a matter of courtesy to the noncustodial parent whose visitation rights are bound to be adversely affected by the move. *See id.*

32. *See* *H. Clark, supra* note 1, § 17.4, at 587. *But see* *Sipos v. Sipos*, 73 A.D.2d 1055, 1056, 425 N.Y.S.2d 414, 416 (1980) (custodial parent impliedly prohibited under divorce decree from removing child and thereby rendering illusory noncustodial parent's visitation rights).

33. *Foss v. Foss*, 392 So. 2d 606, 608 (Fla. Dist. Ct. App. 1981); *Strahl v. Strahl*, 66 A.D.2d 571, 573, 414 N.Y.S.2d 184, 185 (1979), *aff'd*, 49 N.Y.2d 1036, 407 N.E.2d 479, 429 N.Y.S.2d 635 (1980); *In re Marriage of Meier*, 286 Or. 437, 440, 595 P.2d 474, 475 (1979).

child.³⁴ Failure to seek such permission may result in a contempt citation.³⁵

2. The Noncustodial Parent's Interest in Preventing Removal

The noncustodial parent may try to prevent removal of the child from the jurisdiction in order to maintain visitation rights presently exercised under the divorce decree.³⁶ If no residence restriction ap-

34. A residence restriction is a clause in a separation agreement or divorce decree that prohibits the custodial parent from removing the child from the jurisdiction without the permission of the court or that of the noncustodial parent. *See, e.g.*, *Jenkins v. Jenkins*, 395 So. 2d 1045, 1046 (Ala. Civ. App. 1981) (agreement of parents); *Carney v. Carney*, 1 Kan. App. 2d 544, 544, 571 P.2d 56, 57 (1977) (court approval); *Ex parte Sandefer*, 461 S.W.2d 193, 194 (Tex. Civ. App. 1970) (*per curiam*) (either agreement of parents or court approval). The restriction may require that the custodial parent give the other parent proper notice prior to seeking the court's permission, *see, e.g.*, *In re Marriage of Meier*, 286 Or. 437, 439, 595 P.2d 474, 475 (1979); *Wash v. Menn*, 588 S.W.2d 637, 638 (Tex. Civ. App. 1979), relieve the custodial parent from seeking permission if the move outside of the jurisdiction will not exceed a specified period of time, typically 30 days, *see, e.g.*, *Carney v. Carney*, 1 Kan. App. 2d 544, 544, 571 P.2d 56, 57 (1977), confine the custodial parent to a particular locale within the state, *see, e.g.*, *Strahl v. Strahl*, 66 A.D.2d 571, 573, 414 N.Y.S.2d 184, 185 (1979) (50-mile radius of New York City), *aff'd*, 49 N.Y.2d 1036, 407 N.E.2d 479, 429 N.Y.S.2d 635 (1980), or apply to the noncustodial parent as well. *See, e.g.*, *Ex parte Sandefer*, 461 S.W.2d 193, 194 (Tex. Civ. App. 1970) (*per curiam*).

The custodial parent is free to petition the court to modify the residence restriction itself if the need to seek permission for removal is not desired. *See, e.g.*, *Jenkins v. Jenkins*, 395 So. 2d 1045, 1046 (Ala. Civ. App. 1981); *Carney v. Carney*, 1 Kan. App. 2d 544, 544, 571 P.2d 56, 57 (1977); *Christopher v. Christopher*, 62 Wash. 2d 82, 84, 381 P.2d 115, 116 (1963); H. Clark, *supra* note 1, § 17.7, at 600. The court that grants the divorce has continuing jurisdiction to modify the decree even if jurisdiction is not reserved. *Id.* at 598; *see Note, Committee Decision of Child Custody Disputes and the Judicial Test of "Best Interests,"* 73 Yale L.J. 1201, 1204 n.16 (1964) [hereinafter cited as *Child Custody Disputes*]. The power of modification is not diminished by the fact that the decree may have had incorporated into it a contractual agreement between the parents relating to the various aspects of custody, including residence of the child. H. Clark, *supra* note 1, § 17.7, at 598; *see Child Custody Disputes, supra*, at 1204 n.16. If the court allows removal, either under the terms of the residence restriction or by modification, then visitation privileges are ordinarily reduced. *See infra* notes 42-43 and accompanying text. A court that has jurisdiction to permit removal has jurisdiction to modify the visitation rights of the noncustodial parent. *See Note, The Best Interests of the Child in Custody Controversies Between Natural Parents: Interpretations and Trends*, 18 Washburn L.J. 482, 484-85 (1979) [hereinafter cited as *Interpretations and Trends*].

35. *See Clark v. Clark*, 46 Ala. App. 432, 436, 243 So. 2d 517, 521 (Civ. App. 1970); *In re Marriage of Ditto*, 52 Or. App. 609, 612-13, 628 P.2d 777, 779 (1981).

36. *See, e.g.*, *Bernick v. Bernick*, 31 Colo. App. 485, 486, 505 P.2d 14, 15 (1972); *Scheiner v. Scheiner*, 336 So. 2d 406, 407 (Fla. Dist. Ct. App. 1976); *Weiss v. Weiss*, 52 N.Y.2d 170, 172, 418 N.E.2d 377, 378, 436 N.Y.S.2d 862, 863 (1981); *In re Marriage of Meier*, 286 Or. 437, 440, 595 P.2d 474, 475 (1979).

pears in the decree, that parent may petition the court for a modification of the decree to prohibit removal.³⁷ If the decree contains a residence restriction, and the custodial parent requests judicial approval to remove the child from the jurisdiction,³⁸ the noncustodial parent may seek injunctive relief,³⁹ a change in custody⁴⁰ or otherwise attempt to block relocation.⁴¹

If the court permits removal over the objection of the noncustodial parent, the resulting greater distance between that parent and the child may make the maintenance of frequent visitation "unjustifiably upsetting and disruptive to the routine of the [child]." ⁴² The court, therefore, in an effort to formulate a realistic visitation schedule, is likely to revise the divorce decree to provide for less frequent, although regular, visitation.⁴³

37. See, e.g., *Bernick v. Bernick*, 31 Colo. App. 485, 486, 505 P.2d 14, 15 (1972); *Scheiner v. Scheiner*, 336 So. 2d 406, 407 (Fla. Dist. Ct. App. 1976); *In re Marriage of Lower*, 269 N.W.2d 822, 825 (Iowa 1978) (en banc); *Daghir v. Daghir*, 82 A.D.2d 191, 192, 441 N.Y.S.2d 494, 495 (1981), *aff'd*, 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982); *In re Marriage of Smith*, 290 Or. 567, 571, 624 P.2d 114, 116 (1981).

38. See *supra* note 34.

39. See, e.g., *In re Marriage of Meier*, 286 Or. 437, 440, 595 P.2d 474, 475 (1979); *Wash v. Menn*, 588 S.W.2d 637, 638 (Tex. Civ. App. 1979).

40. See, e.g., *Strahl v. Strahl*, 66 A.D.2d 571, 573, 414 N.Y.S.2d 184, 185 (1979), *aff'd*, 49 N.Y.2d 1036, 407 N.E.2d 479, 429 N.Y.S.2d 635 (1980); *Christopher v. Christopher*, 62 Wash. 2d 82, 84, 381 P.2d 115, 116 (1963); *Fritschler v. Fritschler*, 60 Wis. 2d 283, 285, 208 N.W.2d 336, 337 (1973).

41. The noncustodial parent is not limited to a single remedy, but may seek any combination of appropriate remedies. See, e.g., *Strahl v. Strahl*, 66 A.D.2d 571, 573, 414 N.Y.S.2d 184, 185 (1979) (cross-motion for sole custody or, in the alternative, for order conditioning custodial parent's retention of custody on remaining within geographical area prescribed by residence restriction), *aff'd*, 49 N.Y.2d 1036, 407 N.E.2d 479, 429 N.Y.S.2d 635 (1980); *Fritschler v. Fritschler*, 60 Wis. 2d 283, 285, 208 N.W.2d 336, 337 (1973) (cross-motion for transfer of custody and for order temporarily restraining removal pending outcome of hearing). If the custodial parent defies the provisions of a residence restriction, the other parent can institute contempt proceedings. See *Entwistle v. Entwistle*, 61 A.D.2d 380, 383, 402 N.Y.S.2d 213, 214, *appeal dismissed*, 44 N.Y.2d 851 (1978).

42. *In re Marriage of Lower*, 269 N.W.2d 822, 827 (Iowa 1978) (en banc) (quoting *Remsburg v. Remsburg*, 180 N.W.2d 461, 463 (Iowa 1970)). In *Lower* the court would not allow the child to make trips from Iowa to Minnesota on alternate weekends to visit his father. Even if a noncustodial parent were able to travel from a distant jurisdiction on a weekly basis to visit the child, the conditions under which such visitation may occur would not make it beneficial to the child. See *infra* text accompanying note 50 (noting unsuitability of transient lodgings as place for visitation). When removal to another jurisdiction would not make impractical frequent and regular visitation, a court will not alter a visitation schedule. See *Middlekauff v. Middlekauff*, 161 N.J. Super. 84, 96-97, 390 A.2d 1202, 1208-09 (App. Div. 1978).

43. See, e.g., *In re Marriage of Lower*, 269 N.W.2d 822, 827 (Iowa 1978) (en banc); *Hale v. Hale*, 1981 Mass. App. Ct. Adv. Sh. 2117, 2125, 429 N.E.2d 340, 345 (1981); *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 207, 211-12, 365 A.2d 27, 30, 32-33 (Ch. Div.), *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976); *Weber v. Weber*, 84 A.D.2d 940, 940-41, 446 N.Y.S.2d 676, 677 (1981).

3. The Effect of Removal on the Child

Substitute visitation schedules often do not adequately meet the needs of a child. Subjectively, the infrequency of contact with the noncustodial parent denies the child the benefits of that parent's guidance and influence.⁴⁴ Alternative visitation arrangements may also prove to be unworkable from certain objective standpoints. High travel costs may drastically curtail the visitation allowed under a modified schedule.⁴⁵ Even if support payments are decreased to help cover travel expenses,⁴⁶ or if a portion of those expenses is borne by the custodial parent,⁴⁷ such financial assistance does not compensate for the fact that relocation deprives the child and noncustodial parent of frequent contacts with each other.⁴⁸

44. See *Weiss v. Weiss*, 52 N.Y.2d 170, 176, 418 N.E.2d 377, 380-81, 436 N.Y.S.2d 862, 865-66 (1981); *Daghir v. Daghir*, 82 A.D.2d 191, 195, 441 N.Y.S.2d 494, 497 (1981), *aff'd*, 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982); *Fritschler v. Fritschler*, 60 Wis. 2d 283, 289, 208 N.W.2d 336, 339 (1973); *Residence Restrictions*, *supra* note 4, at 359. But see *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 207, 365 A.2d 27, 30 (Ch. Div.) (speculating that alternative of longer but fewer visits may better serve the parental relationship), *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976); *cf. Mnookin*, *supra* note 4, at 258 (no reliable behavioral theory predicts impact of alternative custody arrangements on child).

45. See, e.g., *Clark v. Clark*, 46 Ala. App. 432, 436, 243 So. 2d 517, 520 (Civ. App. 1970); *Lucy K.H. v. Carl W.H.*, 415 A.2d 510, 515 (Del. Fam. Ct. 1979); *In re Marriage of Burgham*, 86 Ill. App. 3d 341, 347, 408 N.E.2d 37, 41 (1980); *Weiss v. Weiss*, 52 N.Y.2d 170, 176, 418 N.E.2d 377, 380, 436 N.Y.S.2d 862, 865-66 (1981); *Residence Restrictions*, *supra* note 4, at 359.

46. See, e.g., *Hale v. Hale*, 1981 Mass. App. Ct. Adv. Sh. 2117, 2125, 429 N.E.2d 340, 345 (1981); *Hutchins v. Hutchins*, 84 Mich. App. 236, 240 n.3, 269 N.W.2d 539, 541 n.3 (1978) (Beasley, J., concurring); *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 211-12, 365 A.2d 27, 33 (Ch. Div.), *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976); *Martinez v. Konczewski*, 85 A.D.2d 717, 717, 445 N.Y.S.2d 844, 845 (1981); *cf. Sipos v. Sipos*, 73 A.D.2d 1055, 1056, 425 N.Y.S.2d 414, 416 (1980) (withholding of support payments to compensate for failure of custodial parent to abide by decreed visitation arrangement).

47. See, e.g., *In re Marriage of Lower*, 269 N.W.2d 822, 827 (Iowa 1978) (en banc); *Broomfield v. Broomfield*, 283 So. 2d 839, 840 (La. Ct. App. 1973); *Burich v. Burich*, 314 N.W.2d 82, 87 (N.D. 1981); *In re Marriage of Ditto*, 52 Or. App. 609, 615, 628 P.2d 777, 780 (1981).

48. *Balbirer*, *supra* note 14, at 364. Courts often fail to recognize that notwithstanding the speed of modern air travel, *Hutchins v. Hutchins*, 84 Mich. App. 236, 240 n.3, 269 N.W.2d 539, 541 n.3 (1978) (Beasley, J., concurring); *Todaro v. Todaro*, 76 A.D.2d 816, 817, 429 N.Y.S.2d 670, 672 (1980), and its affordability by some noncustodial parents, *Fritschler v. Fritschler*, 60 Wis. 2d 283, 289, 208 N.W.2d 336, 339 (1973); *Whitman v. Whitman*, 28 Wis. 2d 50, 55, 58, 135 N.W.2d 835, 837, 839 (1965), infrequent visits under alternative arrangements do not enable the child to develop a close relationship with the noncustodial parent. See *Daghir v. Daghir*, 82 A.D.2d 191, 194-95, 441 N.Y.S.2d 494, 496-97 (1981), *aff'd*, 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982); *Fritschler v. Fritschler*, 60 Wis. 2d 283, 289, 208 N.W.2d 336, 339 (1973).

In addition, travel for the purpose of accomplishing visitation does not depend exclusively upon financial considerations. The noncustodial parent may discover that the blocks of time needed for making long trips are unavailable because of employment-related commitments.⁴⁹ If remarried, that parent probably has time-consuming obligations to the spouse and any children of the second marriage.

Moreover, when the noncustodial parent does visit the child, the conditions under which the visit takes place may not be conducive to the development of a close parental relationship. Most likely the traveling parent will have to obtain lodging near the residence of the custodial parent for the duration of the visit. Transient lodging does not provide a sufficiently home-like environment in which a child can feel comfortable while spending time with a parent whom he now sees infrequently.⁵⁰

Substitute visitation arrangements can conflict with the desires and needs of the child as well. Summer school, work or camp may interfere with court-ordered visitation.⁵¹ The noncustodial parent will have to convince the child that their relationship is more important than the child's desire to pursue these interests or to spend time with friends.⁵²

The importance of frequent and regular visitation and the inadequacies of substitute arrangements suggest that the custodial parent should be required to satisfy a heavy evidentiary burden to justify the child's removal from the jurisdiction and a consequent modification of the visitation schedule.

II. THE "BEST INTERESTS" TESTS IN REMOVAL CASES

The determination of whether to permit the removal of a child from the jurisdiction is committed to the discretion of the trial court.⁵³

49. *Strahl v. Strahl*, 66 A.D.2d 571, 578, 414 N.Y.S.2d 184, 188 (1979), *aff'd*, 49 N.Y.2d 1036, 407 N.E.2d 479, 429 N.Y.S.2d 635 (1980); *cf.* *Whitman v. Whitman*, 28 Wis. 2d 50, 55, 58, 135 N.W.2d 835, 837, 839 (1965) (alternative visitation arrangements would not unduly burden the noncustodial parent whose employment and wealth allowed him time and wherewithal to travel).

50. *See* *Martinez v. Konczewski*, 85 A.D.2d 717, 719, 445 N.Y.S.2d 844, 847 (1981) (Lazer, J., dissenting). One court has held that the custodial parent is not obligated to forfeit the right of privacy by making the custodial home available for use by the visiting noncustodial parent unless circumstances, such as the child's extreme youth or ill health, dictate that the custodial residence be used as the place of visitation. *Foss v. Foss*, 392 So. 2d 606, 607 (Fla. Dist. Ct. App. 1981).

51. *Johnson*, *supra* note 8, at 17.

52. *See* *Martinez v. Konczewski*, 85 A.D.2d 717, 719, 445 N.Y.S.2d 844, 847 (1981) (Lazer, J., dissenting). One commentator has suggested that as the child grows older and becomes more involved in outside activities, the burden of making arrangements with the noncustodial parent may have to be placed on the child. *Johnson*, *supra* note 8, at 17.

53. *Jenkins v. Jenkins*, 395 So. 2d 1045, 1046 (Ala. Civ. App. 1981); *Carney v. Carney*, 1 Kan. App. 2d 544, 544, 571 P.2d 56, 57 (1977); *Hutchins v. Hutchins*, 84

In exercising its discretion, the court will assess a multitude of facts⁵⁴ against one single standard—the “best interests” of the child.⁵⁵ As in all cases in which a court’s discretion is broad, appellate review is limited to the issue of abuse of discretion.⁵⁶

To help trial court judges manage the variety of facts in removal determinations, and to assist appellate courts in reviewing more effectively such determinations, some courts have derived tests from the “best interests” standard. The relative strictness of these tests is a function of the evidentiary burdens⁵⁷ they place on the custodial parent.

A. The New York “Exceptional Circumstances” Test

Stressing the significance of frequent and regular visitation between the child and noncustodial parent, New York courts permit removal only when “exceptional circumstances” are shown.⁵⁸ In the leading case of *Weiss v. Weiss*,⁵⁹ a custodial mother sought to move to Las Vegas with her child in the hope of “putting an interest in singing to vocational advantage after a lapse of some 15 years.”⁶⁰ To preserve his weekly visitation privileges, the father commenced a proceeding to enjoin the removal. The mother argued in part that the residency

Mich. App. 236, 238, 269 N.W.2d 539, 539 (1978); *In re Marriage of Meier*, 286 Or. 437, 445, 595 P.2d 474, 478 (1979); see *Child Custody Disputes*, *supra* note 34, at 1206.

54. For illustrations of how these various facts have been analyzed in the context of removal tests, see *infra* sections (A)-(D) of this Part.

55. See, e.g., *In re Custody of Arquilla*, 85 Ill. App. 3d 1090, 1092, 407 N.E.2d 948, 949-50 (1980); *Hart v. Hart*, 539 S.W.2d 679, 682 (Mo. Ct. App. 1976); *Burich v. Burich*, 314 N.W.2d 82, 85 (N.D. 1981); *Fritschler v. Fritschler*, 60 Wis. 2d 283, 287-88, 208 N.W.2d 336, 338-39 (1973); 2 W. Nelson, *supra* note 8, § 15.20, at 265-66.

56. *Jenkins v. Jenkins*, 395 So. 2d 1045, 1046 (Ala. Civ. App. 1981); *In re Marriage of Young*, 529 P.2d 344, 345 (Colo. Ct. App. 1974); *Hutchins v. Hutchins*, 84 Mich. App. 236, 238, 269 N.W.2d 539, 539 (1978); *Jafari v. Jafari*, 204 Neb. 622, 624-25, 284 N.W.2d 554, 555-56 (1979). In view of the breadth of the trial court’s discretion in removal cases, *Foley v. Foley*, 214 Cal. App. 2d 802, 808, 29 Cal. Rptr. 857, 861 (1963); see *In re Marriage of Meier*, 286 Or. 437, 446, 595 P.2d 474, 478-79 (1979), its decisions are difficult to overturn on appeal. *Child Custody Disputes*, *supra* note 34, at 1206; see Mnookin, *supra* note 4, at 253-54.

57. See *supra* note 5.

58. *Weber v. Weber*, 84 A.D.2d 940, 940-41, 446 N.Y.S.2d 676, 677 (1981); *Daghir v. Daghir*, 82 A.D.2d 191, 196, 441 N.Y.S.2d 494, 497 (1981), *aff’d*, 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982); see *Weiss v. Weiss*, 52 N.Y.2d 170, 176-77, 418 N.E.2d 377, 380-81, 436 N.Y.S.2d 862, 865-66 (1981); *Martinez v. Konczewski*, 85 A.D.2d 717, 717, 445 N.Y.S.2d 844, 844-45 (1981).

59. 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981).

60. *Id.* at 173, 418 N.E.2d at 379, 436 N.Y.S.2d at 864. The mother had not been made a firm job offer. *Id.* at 177, 418 N.E.2d at 381, 436 N.Y.S.2d at 866. See *supra* text accompanying notes 24-26.

clause in the separation agreement, which was incorporated into the divorce decree, enabled her to remove the child from the jurisdiction.⁶¹ The trial court denied the father's application,⁶² but the Appellate Division reversed,⁶³ holding that the interference with visitation rights was not warranted by the circumstances.⁶⁴

The New York Court of Appeals affirmed.⁶⁵ It characterized the residency clause as a "boilerplate" provision functioning only to "memorialize" the separated status of the parents.⁶⁶ The court noted that the clause made no reference to the child, and that its enforcement would render meaningless the extensive and explicit visitation provisions of the divorce decree.⁶⁷ Finally, the court concluded that the benefits of frequent and regular visits outweighed the benefits of occasional, but longer, visits.⁶⁸

The strict approach of *Weiss* conforms to that established by New York's lower courts, which have insisted on a showing of "exceptional circumstances" to justify removal.⁶⁹ These courts have charted sev-

61. 52 N.Y.2d at 173, 418 N.E.2d at 379, 436 N.Y.S.2d at 864. The residency clause provided that "the [h]usband and the [w]ife shall continue to live separate and apart from each other and [that] each may reside from time to time at such place or places of residence or abode as he or she shall respectively choose." *Id.* For a brief discussion of the legal effect of the incorporation of a separation agreement into a divorce decree, see *supra* note 34.

62. 52 N.Y.2d at 172, 418 N.E.2d at 378, 436 N.Y.S.2d at 863.

63. *Weiss v. Weiss*, 76 A.D.2d 863, 863-64, 428 N.Y.S.2d 506, 507 (1980), *aff'd*, 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981).

64. *Id.* at 864, 428 N.Y.S.2d at 507.

65. 52 N.Y.2d at 174, 418 N.E.2d at 379, 436 N.Y.S.2d at 864.

66. *Id.*

67. *Id.* The decree provided for "visits [on] one weekday afternoon each week, two-day visits every other weekend, alternating Easter and Christmas holiday seasons and two continuous weeks during the summer." *Id.* at 173, 418 N.E.2d at 378-79, 436 N.Y.S.2d at 864. According to the court, the factual findings showed that the father fully and regularly availed himself of his visitation opportunities, and that he had a strong, positive relationship with his son. *Id.* at 173, 418 N.E.2d at 379, 436 N.Y.S.2d at 864.

68. *Id.* at 176, 418 N.E.2d at 380-81, 436 N.Y.S.2d at 865-66. *But cf.* *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 207, 365 A.2d 27, 30 (Ch. Div.) (fewer visits of longer duration may better serve the child's welfare), *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976). See *supra* text accompanying notes 14-19. The court noted that the custodial mother's plans were made in good faith. 52 N.Y.2d at 176, 418 N.E.2d at 380, 436 N.Y.S.2d at 865. There was no indication that she wished to jeopardize the child-father relationship by her relocation. *Id.* She had also checked Las Vegas for a suitable home, school and place of religious instruction for her child. *Id.*

69. *Weber v. Weber*, 84 A.D.2d 940, 940, 446 N.Y.S.2d 676, 677 (1981); *Daghir v. Daghir*, 82 A.D.2d 191, 196, 441 N.Y.S.2d 494, 497 (1981), *aff'd*, 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982); *Becker v. Becker*, 75 A.D.2d 814, 814, 427 N.Y.S.2d 492, 492 (1980); *Milici v. Milici*, 57 A.D.2d 946, 946, 395 N.Y.S.2d 90, 91 (1977).

eral contexts in which "exceptional circumstances" may exist. For example, the health or educational needs of the custodial parent or the child may justify removal. The court in *Deutsch v. Deutsch*⁷⁰ refused to disturb a Family Court order that increased support for an infant whom the mother had taken to Florida.⁷¹ In view of the mother's breast surgery and hysterectomy, and her hospitalization after a major car accident, the court noted that the mother did not go to Florida "to flee her creditors, to simply enjoy a vacation or to spite [the father]." ⁷² In *Harris v. Harris*,⁷³ a custodial mother was allowed to move with her children to Illinois, the location of the only university in the country at which she could obtain a doctorate in language pathology.⁷⁴ The court reasoned that the advanced degree would promote the children's best interests because it promised the security of greater income and eventual tenure for the mother.⁷⁵

As intimated by the *Weiss* court in dictum, "exceptional circumstances" may exist in other contexts as well. Removal may be justified when the custodial parent receives "a unique, or even firm, vocational offer,"⁷⁶ or when the obligations of remarriage require a "dramatic change of locale."⁷⁷ Lower courts, however, have narrowly construed this broad, imprecise language in *Weiss*.

70. 53 A.D.2d 861, 385 N.Y.S.2d 357 (1976), *appeal denied*, 40 N.Y.2d 808, 392 N.Y.S.2d 1026 (1977).

71. *Id.* at 861-62, 385 N.Y.S.2d at 357. The case, however, does not indicate how removal was originally accomplished.

72. *Id.* at 862, 385 N.Y.S.2d at 357. For other cases that have discussed removal in the context of health considerations, see *Sipos v. Sipos*, 73 A.D.2d 1055, 1056, 425 N.Y.S.2d 414, 416 (1980) (custodial parent's health); *Nash v. Nash*, 236 A.D. 89, 89-90, 258 N.Y.S. 313, 313 (1932) (*per curiam*) (child's health), *aff'd per curiam*, 261 N.Y. 579, 185 N.E. 746 (1933); *Denberg v. Denberg*, 34 Misc. 2d 980, 986, 229 N.Y.S.2d 831, 837 (Sup. Ct. 1962) (custodial parent's or child's health); *Whittemore v. Whittemore*, 202 Misc. 175, 178, 109 N.Y.S.2d 216, 219 (Sup. Ct. 1951) (same).

73. 57 Misc. 2d 672, 293 N.Y.S.2d 592 (Fam. Ct. 1968).

74. *Id.* at 674, 293 N.Y.S.2d at 595.

75. *Id.* at 674-75, 293 N.Y.S.2d at 595-96. The court's belief that the best interests of the child would be enhanced by the mother's obtaining a doctorate underscores the court's recognition that the welfare of the child and custodial parent are intertwined. See J. Wallerstein & J. Kelly, *supra* note 8, at 224-25. In allowing removal, the court seemed to be influenced by the father's failure to exercise his visitation rights as often as permitted under the divorce decree. 57 Misc. 2d at 677, 293 N.Y.S.2d at 597. It further noted that the move was a temporary one because the mother would return to New York within three years. *Id.* at 677, 293 N.Y.S.2d at 598. The father would also be able to have the children with him for an extended period during the summer. *Id.*

76. 52 N.Y.2d at 177, 418 N.E.2d at 381, 436 N.Y.S.2d at 866. The *Weiss* court characterized the mother's proposed move as a search "for no more than an 'opportunity.'" *Id.*

77. *Id.*

For example, in *Priebe v. Priebe*,⁷⁸ a custodial mother obtained employment in Colorado because job opportunities in her field "were severely limited in Buffalo."⁷⁹ The court held that her difficulties in finding employment, without more, did not rise to the level of "exceptional circumstances" or a "pressing concern" for the welfare of the custodial family unit that would warrant the disruption of weekly visitation between the father and children.⁸⁰ The court indicated that before it would permit removal, a custodial parent would have to prove that "pressing financial concerns" necessitated a search for more lucrative employment,⁸¹ and that such employment could not be found either in the jurisdiction or in one whose proximity "would not unduly interfere with visitation."⁸² Moreover, a custodial parent would have to demonstrate that the former spouse could not or should not pay increased child support to help alleviate financial difficulties.⁸³

In another case, *Daghir v. Daghir*,⁸⁴ the court would not permit a custodial mother to move with her children to France so that she could accompany her second husband, who had voluntarily accepted a temporary job assignment for his company in that country.⁸⁵ Testimony of the career manager of the second husband suggested that the latter apparently accepted the position simply to enrich his portfolio, as he stood to gain nothing by way of career or financial advancement.⁸⁶ The court held that a move not dictated by compelling financial or employment⁸⁷ considerations did not justify the curtailment of the children's frequent and regular visitation with their natu-

78. 81 A.D.2d 746, 438 N.Y.S.2d 413 (1981), *aff'd*, 55 N.Y.2d 997, 434 N.E.2d 708, 449 N.Y.S.2d 472 (1982).

79. *Id.* at 747, 438 N.Y.S.2d at 414.

80. *Id.*

81. *Id.*; *accord* *Daghir v. Daghir*, 82 A.D.2d 191, 196, 441 N.Y.S.2d 494, 497 (1981), *aff'd*, 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982); *Sipos v. Sipos*, 73 A.D.2d 1055, 1056, 425 N.Y.S.2d 414, 416 (1980); *Strahl v. Strahl*, 66 A.D.2d 571, 578, 414 N.Y.S.2d 184, 188 (1979), *aff'd*, 49 N.Y.2d 1036, 407 N.E.2d 479, 429 N.Y.S.2d 635 (1980).

82. 81 A.D.2d at 747, 438 N.Y.S.2d at 414. Although the court did not define "undue interference," the term would appear to refer to a relocation of the custodial family unit at such a distance from the noncustodial parent as to frustrate frequent and regular visitation.

83. *Id.*

84. 82 A.D.2d 191, 441 N.Y.S.2d 494 (1981), *aff'd*, 56 N.Y.2d 938, 439 N.E.2d 324, 453 N.Y.S.2d 609 (1982).

85. *Id.* at 196, 441 N.Y.S.2d at 497.

86. *Id.* at 192-93, 196, 441 N.Y.S.2d at 495, 497.

87. This case indicates that a proposed move that would result in the second spouse's career advancement may constitute a "compelling" employment consideration justifying removal. *Id.* Two prior New York cases actually permitted removal when it was dictated by vocational circumstances beyond the second spouse's control. In *Cmaylo v. Cmaylo*, 76 A.D.2d 898, 429 N.Y.S.2d 44, *appeal dismissed*, 51 N.Y.2d 770 (1980), a custodial mother was permitted to relocate with her child when her

ral father.⁸⁸ In other words, the facts did not present a situation in which the obligations of a remarriage legitimately required a "dramatic change of locale."⁸⁹

The New York test imposes a stringent burden of production upon the custodial parent. A presently single or remarried custodial parent must demonstrate that the desire to relocate with the child is dictated by exceptional health, educational or financial considerations. A custodial parent whose desire to move is occasioned by the job transfer of a second spouse must show that the transfer represents an employment decision not within that spouse's control.⁹⁰

B. The New Jersey "Real Advantage" Test

New Jersey courts have placed on the custodial parent a burden of production lighter than that imposed by New York courts. This lighter burden, as demonstrated in *D'Onofrio v. D'Onofrio*,⁹¹ results from equating the best interests of the child with the best interests of the new, post-divorce family unit of custodial parent and child. To determine if relocation to another jurisdiction would result in a "real advantage" to the custodial parent and the child,⁹² a court will examine the following factors: 1) whether the move has a "likely capacity"

second husband was involuntarily transferred to Texas by his company. *Id.* at 898-99, 429 N.Y.S.2d at 45. Testimony indicated that if the second husband failed to move he would lose his job. *Id.* at 899, 429 N.Y.S.2d at 45. In *Martinez v. Konczewski*, 7 Fam. L. Rep. (BNA) 2322 (N.Y. Sup. Ct.), *aff'd as modified*, 85 A.D.2d 717, 445 N.Y.S.2d 844 (1981), the court allowed a custodial mother to move with her child to Florida, *id.* at 2324, where her second husband, a chiropractor, had opened an office. *Id.* at 2322. Because of the "restrictive conditions" that existed in New York with regard to the second husband's profession, and his inability to obtain employment there, the court reasoned that the second husband was being "forced" to move to Florida. *Id.* at 2324 (analogizing spouse's predicament to that of the spouse in *Cmaylo*). Thus, in New York, the only instances in which courts have permitted removal of a child for "compelling" employment considerations of the custodial parent's second spouse are those involving relocations not initially desired or sought by that spouse.

88. 82 A.D.2d at 196, 441 N.Y.S.2d at 497. The court noted that the father's ability to visit with his children in France was speculative at best, that there was no guarantee of the return of the children to the jurisdiction once the mother's second husband completed his assignment, and that the mother exhibited a lack of good faith when she failed to inform the father of her impending move. *Id.* at 195-96, 441 N.Y.S.2d at 497.

89. See *Weiss v. Weiss*, 52 N.Y.2d 170, 177, 418 N.E.2d 377, 381, 436 N.Y.S.2d 862, 866 (1981).

90. See *supra* note 6 (noting similarity of California and Minnesota removal tests to that of New York). For a discussion of the leading New York cases on removal, see Meyer & Schlissel, *Difficult Area for Judges—Child Custody in Divorces*, N.Y.L.J., Sept. 16, 1982, at 3, col. 1.

91. 144 N.J. Super. 200, 365 A.2d 27 (Ch. Div.), *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976).

92. *Id.* at 206, 365 A.2d at 30.

for improving the general quality of life of the custodial family unit;⁹³ 2) whether the custodial parent is motivated to move primarily for the purpose of defeating the other parent's visitation rights;⁹⁴ 3) whether the noncustodial parent is resisting removal principally to avoid an increase in support obligations;⁹⁵ and 4) whether adequate substitute visitation arrangements with which the custodial parent will comply are available to foster the child's relationship with the noncustodial parent.⁹⁶

This "real advantage" test, with its pronounced emphasis on the integrity of the new post-divorce family unit,⁹⁷ is premised on several observations made by the *D'Onofrio* court. It recognized that a custodial parent is charged with the responsibility and obligation to provide the day-to-day care of the child and the environment in which he will be raised.⁹⁸ The court also suggested that allowing a noncustodial parent longer, yet fewer, uninterrupted visits might "serve the [parental] relationship better than the typical weekly visit which involves little if any exercise of real [parental] responsibility."⁹⁹ Finally, the court reasoned that a noncustodial parent's freedom to move from the jurisdiction to seek a better life should be matched by a comparable

93. *Id.* In *D'Onofrio*, the custodial mother clearly satisfied this factor. In her present employment, she barely earned enough to meet her family's needs and received little assistance, financial or otherwise, from the noncustodial father in rearing the children. *Id.* at 209, 365 A.2d at 31. Her proposed move would enable her to accept an offer of employment in her field of training at a considerably higher salary. *Id.* at 209-10, 365 A.2d at 31-32. Furthermore, she would be living near relatives, who could help with the care of the children. *Id.* at 210, 365 A.2d at 32.

94. *Id.* at 206, 365 A.2d at 30. The noncustodial father had assumed only a minimal role in raising the children despite the mother's attempts to include him in that process. The mother's history of trying to facilitate the father's exercise of his visitation rights convinced the court that her relocation was not inspired by a desire to defeat visitation. *Id.* at 211, 365 A.2d at 32.

95. *Id.* at 206-07, 365 A.2d at 30.

96. *Id.* The court was satisfied that the alternative visitation arrangements were adequate to maintain the child-father relationship. *Id.* at 211-12, 365 A.2d at 32-33. Additionally, the court was confident that the custodial mother would comply with the schedule of such visitation. *Id.* at 211, 365 A.2d at 32.

97. *Id.* at 205-06, 365 A.2d at 29-30.

98. *Id.* at 205-06, 365 A.2d at 29. The court's implication was that any decision of a custodial parent concerning this responsibility should be given high priority.

99. *Id.* at 207, 365 A.2d at 30. The court appears to contradict a position it adopted earlier in the opinion when it stated that "some variation of visitation on a weekly basis is traditionally viewed as being most consistent with maintaining the parental relationship" whenever the residence of the child and that of the noncustodial parent are close. *Id.* at 206, 365 A.2d at 30. If the court truly believed that less frequent visitation would better serve the child's welfare, then it would have advocated such visitation even though the child and noncustodial parent live close to each other. Even assuming that weekly visits involve, as the court stated, "little . . . exercise of real [parental] responsibility," *id.* at 207, 365 A.2d at 30, from the child's perspective they are crucial to his growth as a person. See *supra* text accompanying notes 14-19.

freedom of a custodial parent to seek a better life, both personally and for the child, provided that substitute visitation is available.¹⁰⁰

While a "real advantage" must be demonstrated under the New Jersey test, the term is sufficiently vague so as not to require a showing of "exceptional circumstances."¹⁰¹ Although the custodial parent must show that the proposed relocation would significantly improve the well-being of the custodial family unit, credible evidence that a job in a distant jurisdiction would involve a substantial increase in salary may demonstrate a "real advantage" even though the custodial parent is not faced with "pressing financial concerns."¹⁰² Furthermore, before accepting a job offer outside of the jurisdiction, the custodial parent need not try to find suitable employment in a nearby jurisdiction or seek increased child support from the noncustodial parent.¹⁰³

C. The Illinois "Superficial Showing" Test

An Illinois appellate court recently devised a test that is even more beneficial than the New Jersey test to the custodial parent seeking court approval for removal. In *In re Marriage of Burgham*,¹⁰⁴ the court started from the premise stressed in earlier Illinois decisions that "the best interests of a child subject to a custody decree are usually served by leaving the child with the existing custodial parent."¹⁰⁵ It indicated that allowing removal may indirectly benefit the child because a custodial parent with the freedom to move would be a happier and better-adjusted parent.¹⁰⁶

According to the court in *Burgham*, a petitioning custodial parent's burden of production is carried, and a *prima facie* case¹⁰⁷ is estab-

100. 144 N.J. Super. at 207-08, 365 A.2d at 30.

101. See *supra* text accompanying note 58.

102. The Appeals Court of Massachusetts adapted the "real advantage" test of New Jersey to the facts before it in *Hale v. Hale*, 1981 Mass. App. Ct. Adv. Sh. 2117, 2122, 429 N.E.2d 340, 343 (1981). Unlike the proposed move in *D'Onofrio*, the move in *Hale* would not result in greater financial benefit to the custodial parent. The court, however, found that the "real advantage" of the move lay in its promoting the emotional well-being of the custodial family unit. *Id.* at 2125, 429 N.E.2d at 345. The court indicated that by enabling the custodial mother to pursue her career choice, an emotionally stressful situation would be avoided. See *id.* As *Hale* demonstrates, the term "real advantage" is broad enough to encompass a situation in which the primary reason for permitting a move would be to avoid forcing a stressful choice between career ambition and family obligation.

103. See *supra* text accompanying notes 81-83.

104. 86 Ill. App. 3d 341, 408 N.E.2d 37 (1980).

105. *Id.* at 345, 408 N.E.2d at 40 (citing with approval *Gallagher v. Gallagher*, 60 Ill. App. 3d 26, 376 N.E.2d 279 (1978); *Gray v. Gray*, 57 Ill. App. 3d 1, 372 N.E.2d 909 (1978); *Tandy v. Tandy*, 42 Ill. App. 3d 87, 355 N.E.2d 585 (1976)).

106. 86 Ill. App. 3d at 345, 408 N.E.2d at 40.

107. A "prima facie" case consists of "certain selected elements which are regarded as sufficient to entitle plaintiff to [prevail], if he proves them and unless defendant in

lished, when: 1) a desire to remove the child from the jurisdiction is stated; 2) a "sensible reason" for the prospective move is demonstrated; and 3) a "superficial showing" that the move is consistent with the best interests of the child is made.¹⁰⁸

To satisfy the "superficial showing" aspect of the test, the custodial parent does not have to prove that the move would directly benefit the child because "a child often receives little, if any, demonstrable benefit from moving."¹⁰⁹ Rather, that parent has to show merely that the move would not harm the child.¹¹⁰

Once the custodial parent makes out a prima facie case, the burden of producing evidence shifts to the noncustodial parent,¹¹¹ who may then introduce evidence of specific damage that he or she believes is likely to befall the child if removal is approved.¹¹² If the petitioning parent succeeds in carrying the burden of persuasion,¹¹³ the court must still be satisfied that substitute visitation is realistically possible before it will permit removal.¹¹⁴

Under this removal test, the custodial parent never has the burden of introducing evidence that an "exceptional circumstance"¹¹⁵ or even a "real advantage"¹¹⁶ prompted the desire to move. Allowing instead proof that the child will not be harmed by the move effectively relieves the custodial parent of the responsibility of demonstrating that the move will promote the best interests of the child.¹¹⁷

turn establishes other elements which would offset them." Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 Stan. L. Rev. 5, 7 (1959) (emphasis in original) (footnote omitted).

108. 86 Ill. App. 3d at 345-46, 408 N.E.2d at 40. Once the court fashioned the test, it did not attempt to apply it. Instead, it reversed and remanded the case for further proceedings in the trial court. *Id.* at 347, 408 N.E.2d at 41.

109. *Id.* at 346, 408 N.E.2d at 40.

110. *See id.* (custodial parent "need not negate all possibilities of harm to the child" that could result from the move).

111. *See* C. McCormick, *supra* note 5, § 342, at 803 n.26; 9 J. Wigmore, *Evidence in Trials at Common Law* § 2494, at 379 (J. Chadbourn rev. ed. 1981). The significance of the custodial parent's making out a prima facie case is that it eliminates the risk of a directed verdict for the noncustodial parent. *See id.*

112. 86 Ill. App. 3d at 346, 408 N.E.2d at 40. The kind of evidence that the noncustodial father in *Burgham* would have to produce was suggested in the court's instruction to the trial court that it consider the effect on the best interests of the child of the custodial mother's relationship with her male friend. *Id.* at 346, 408 N.E.2d at 41.

113. *See supra* note 5.

114. 86 Ill. App. 3d at 347, 408 N.E.2d at 41.

115. *See supra* text accompanying note 58.

116. *See supra* text accompanying note 92.

117. A showing that no detriment to the child would result from a move is not equivalent to a demonstration that removal would be in the child's best interests. Affirmative proof of specific benefits that would be generated by a move is necessary to make the latter determination. In a later Illinois appellate court decision a variety

D. *The Colorado "Presumption"*

The Colorado Court of Appeals in *Bernick v. Bernick*¹¹⁸ has set forth the most simply structured and least burdensome test yet developed by any state court confronting the removal issue. The noncustodial father in *Bernick* filed a motion requesting modification of the divorce decree to prohibit the mother's planned removal of the children to a city 140 miles from the custodial residence in Denver. The mother appealed the trial court's granting of the father's motion.¹¹⁹

The appellate court reviewed the record, which disclosed that a law firm in the distant city had offered a position to the mother, a lawyer, and that the children desired to live with her there.¹²⁰ The father's sole assertion, which the court noted was supported by competent evidence, was that the move would render visitation with his children more difficult.¹²¹ The court recognized a custodial parent's responsibility to provide the children with the opportunity to visit the other parent but deemed the decision of the mother to move consistent with this responsibility because she did not attempt to remove the children from the jurisdiction of the court.¹²² At the same time, it also recognized a custodial parent's responsibility to select the environment in which to raise the children. According to the court, decisions of a custodial parent relative to this responsibility are entitled to the endorsement of the court that initially awarded custody.¹²³

With these considerations in mind, the court articulated its test: "[I]n the absence of a clear showing to the contrary, decisions of the

of specific benefits was explored. See *In re Feliciano*, 103 Ill. App. 3d 666, 672, 431 N.E.2d 1120, 1125 (1981). Although the court in *Feliciano* fit its analysis into the framework of the *Burgham* test, it required "some showing," rather than a "superficial showing," that the move would be consistent with the child's best interests. See *id.* The court viewed the proposed move to Tennessee as being consistent with the child's best interests because the custodial mother's second husband had secured employment there and had purchased a home with the assistance of a grant program. *Id.* The court also noted that the child was doing well in school, had made friends in Tennessee, and was enjoying an improvement in his general health. *Id.*

118. 31 Colo. App. 485, 505 P.2d 14 (1972).

119. *Id.* at 486, 505 P.2d at 15.

120. *Id.* Courts have recognized that young children's preferences should be treated with caution. See, e.g., *Hale v. Hale*, 1981 Mass. App. Ct. Adv. Sh. 2117, 2125, 429 N.E.2d 340, 345 (1981); *Harris v. Harris*, 57 Misc. 2d 672, 675, 293 N.Y.S.2d 592, 596 (Fam. Ct. 1968); *Moran v. Moran*, 200 N.W.2d 263, 269 (N.D. 1972); see also J. Wallerstein & J. Kelly, *supra* note 8, at 314 (pre-adolescent children not reliable judges of their own best interests).

121. 31 Colo. App. at 486, 505 P.2d at 15.

122. *Id.* at 487, 505 P.2d at 15.

123. *Id.* See *supra* note 98 and accompanying text for discussion of similar observations by a New Jersey court in *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27 (Ch. Div.), *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976).

custodial parent reasonably made in a good faith attempt to fulfill the responsibility imposed by the award of custody should be *presumed* to have been made in the best interests of the children."¹²⁴ Since no contrary showing was made, the court reversed and remanded with directions to vacate the previous order.¹²⁵

The presumption¹²⁶ in *Bernick* depends on proof of the basic fact that the decision to move was "reasonably made in a good faith attempt" to shape the children's environment.¹²⁷ While the custodial parent has the burden of persuading the court that the basic fact exists,¹²⁸ the petitioning noncustodial parent may try to rebut the presumption by offering evidence to disprove the basic fact.¹²⁹ If the noncustodial parent negates the other parent's contention of good faith by demonstrating, for example, that the move is motivated primarily by a desire to defeat visitation, then the use of the presumption should be discarded by the trier of fact.¹³⁰ Even if it cannot be shown that the custodial parent acted in bad faith, the noncustodial parent can still attempt to defeat the presumption by proving that the move would adversely affect the child.¹³¹

A presumption such as that created in *Bernick* strengthens the impact of the evidence presented by the custodial parent: It predis-

124. 31 Colo. App. at 487-88, 505 P.2d at 15-16 (emphasis added).

125. *Id.* at 488, 505 P.2d at 16.

126. A presumption may be defined as a "standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts." C. McCormick, *supra* note 5, § 342, at 803. More specifically, the term describes a rule that dictates that "the establishment of fact B is sufficient to satisfy a party's burden of producing evidence with regard to fact A, [and that] at least compels the shifting of the burden of producing evidence on the question to his adversary." *Id.*

127. 31 Colo. App. at 488, 505 P.2d at 15-16. Translating the Colorado test into the language of presumptions, if a party (the custodial parent) establishes the existence of the basic fact (good faith in desiring relocation), then a presumption arises as to the existence of the presumed fact (relocation is in the best interest of the child). At this juncture, the other party (the noncustodial parent) must introduce proof of the nonexistence of the basic fact (custodial parent's good faith in desiring relocation) or risk the direction of a verdict for the custodial parent. See C. McCormick, *supra* note 5, § 342, at 803.

128. See C. McCormick, *supra* note 5, § 342, at 803.

129. See Cleary, *supra* note 107, at 17.

130. See *id.*

131. See *id.* In this situation, the noncustodial parent would be attacking not the fact from which the presumed fact is derived, but the presumed fact itself. The evidence introduced in this direct attack may, among other possibilities, "lead the trier to conclude that nonexistence of the presumed fact is more probable than [its] existence." *Id.*; cf. Comment, *The Best Interest of the Child Doctrine in Wisconsin Custody Cases*, 64 Marq. L. Rev. 343, 352 (1980) (criticism of use of presumption as "judicial tiebreaker" when divorced parents introduce equally persuasive evidence in custody dispute).

poses the trier of fact to view the request to relocate more sympathetically than would the triers of fact in the previously discussed jurisdictions.

III. A PROPOSED "BEST INTERESTS" TEST

The "exceptional circumstances" test currently employed by the New York courts represents the most effective effort so far of any jurisdiction to serve the needs of the child of divorced parents.¹³² By requiring the custodial parent to demonstrate exceptional health, educational or financial considerations, a court is assured that that parent's reasons for moving are consistent with the promotion of the child's best interests, and thus warrant a reduction in frequent and regular visitation.¹³³

The two additional requirements that a divorced and presently single parent must satisfy in New York when "pressing financial concerns" are urged¹³⁴ are also designed to protect the well-being of a child enjoying frequent and regular contact with the noncustodial parent. The first, that the custodial parent introduce competent proof that "satisfactory employment" could not be obtained "in a location which would not unduly interfere with visitation,"¹³⁵ ensures that the parent will make a good-faith job search in nearby jurisdictions. The court requires this investigation in order to do all that is practically possible to preserve the present visitation schedule for the benefit of the child. In fairness to the custodial parent, however, the employment-search requirement must be reasonably limited. For example, if a custodial parent residing in New York cannot find satisfactory employment there, that parent should not be expected to investigate, before accepting an offer of employment in California, the job opportunities in every jurisdiction in geographical progression from the custodial home in New York. Such a requirement, although implied by the *Priebe* decision,¹³⁶ could not have been intended. The custodial parent should therefore be required to search for employment only in those jurisdictions to which, if removal were permitted, weekly visits would still be possible. If the custodial parent has canvassed these jurisdictions without finding a job, there is little point in demonstrating lack of employment opportunities in the remaining jurisdictions because relocation to any one of them would necessarily render a weekly form of visitation impractical.

132. See *supra* pt. II(A).

133. See *supra* text accompanying notes 69-75, 78-81.

134. See *supra* text accompanying note 81.

135. *Priebe v. Priebe*, 81 A.D.2d 746, 747, 438 N.Y.S.2d 413, 414 (1981), *aff'd*, 55 N.Y.2d 997, 434 N.E.2d 708, 449 N.Y.S.2d 472 (1982).

136. See *id.*

The second requirement of the New York test is that the custodial parent show that the former spouse is not able to pay more child support.¹³⁷ If the spouse can provide additional support, the custodial parent's need to obtain employment in another jurisdiction may be obviated and weekly visitation maintained. This requirement, however, should not be a part of any "best interests" test. It not only demeans the custodial parent by virtually forcing that parent "to go begging" for more money, but it also may frustrate a career choice to which that parent, like anyone else, is entitled.¹³⁸ Sufficient protection would be given to the welfare of the child by other aspects of an "exceptional circumstances" test modeled on the New York test without imposing this second requirement.

While New York courts place a heavy burden of production on a presently single custodial parent who must relocate for exceptional financial reasons, they are considerably more sympathetic to a custodial parent whose move is occasioned by the involuntary job transfer of a second spouse. In the latter instance, the custodial parent does not have to prove that the spouse could not find employment in a jurisdiction conducive to the natural parent's exercise of visitation rights.¹³⁹ Not applying the employment-search requirement in the context of an involuntary job transfer is sensible: Compelling the second spouse to demand a transfer to an available but less distant post may cause the loss of present employment or a future promotion. Such a result would not benefit the child, whose welfare depends in many respects on the earning capacity of his parent's second spouse.¹⁴⁰

Similarly the custodial parent, regardless of marital status, should not have to satisfy the employment-search requirement with respect to an involuntary job transfer. Although there is no reported case in New York in which a custodial parent has been transferred by an employer, New York courts would presumably relax the requirement in such a case.

When the relocation of a second spouse is prompted instead by exceptional financial considerations, the employment-search requirement should be retained. Failure to apply it when the spouse loses nothing by investigating job opportunities in neighboring jurisdictions would set up a double standard: Custodial parents whose second

137. *Id.*

138. A custodial parent should be free to take advantage of economic opportunities that arise. *Gray v. Gray*, 57 Ill. App. 3d 1, 6, 372 N.E.2d 909, 913 (1978); *Pattison v. Pattison*, 208 So. 2d 395, 396 (La. Ct. App. 1968), *cited with approval in In re Marriage of Lower*, 269 N.W.2d 822, 826 (Iowa 1978) (en banc).

139. See *Cmaylo v. Cmaylo*, 76 A.D.2d 898, 898-99, 429 N.Y.S.2d 44, 45, *appeal dismissed*, 51 N.Y.2d 770 (1980).

140. For similar reasons, the employment-search requirement should not be applied to require a custodial parent's second spouse, involuntarily transferred by a branch of the armed services, to seek first an assignment to a post closer to the noncustodial parent's residence.

spouses are seeking more remunerative employment would be given an unjustifiable preference over single custodial parents who are trying to obtain such employment.

CONCLUSION

The application to any removal case of an "exceptional circumstances" test, fashioned after the New York test, assures a trier of fact that the best interests of the child will receive sufficient protection. Satisfaction of its requirements by the custodial parent guarantees that that parent has legitimate reasons for moving, that the child will gain substantial benefits from the move and that frequent and regular visitation, so crucial to the child's development, is being reduced for only justifiable reasons. The jurisdictions of New Jersey, Illinois and Colorado, by requiring the custodial parent to satisfy a lighter burden of production, fail to consider as carefully the welfare of the child. Their tests permit interference with frequent and regular visitation without adequately ensuring that removal will "better serve" the welfare of the child than continued residency in the jurisdiction in which the noncustodial parent lives and exercises such visitation.

Peter Ted Surace