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Still Partners? Examining the Consequences of Post-Dissolution Parenting

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What is the legal relationship between ex-spouses following a divorce?

Contemporary family law presents two conflicting models. Most state divorce schemes envision divorce as an economic “clean break.”² In most states, courts are encouraged to avoid a lingering financial relationship between the divorcing parties. Thus, they should allocate property to achieve economic justice between the divorcing parties and avoid alimony or spousal support payments. Cohabitants have the same clean break upon dissolution for their relationship unless they have contracted to create further obligations between each other.³ Under the clean break model, divorced persons and separated cohabitants are entirely separate individuals, unencumbered by an ongoing legal relationship, free to build new lives and make a fresh start.⁴

In contrast, custody law envisions divorce as the start of a “co-parenting” relationship. The emerging ideology of post-dissolution parenting focuses on mutual

¹ I must thank my summer research assistant, Stefanie Cronin, for diligently read hundreds of relocation cases on my behalf, and wading through them several times to identify various statistical patterns, my current research assistants, Lissette Rivera and Deanna Fisher, who are helping with the final stages of the article, and Michael Foley, for his editorial assistance.

² See, e.g., *Conley v. Conley*, 181 S.W.3d 692 (Tenn. Ct. App. 2005); *Krafick v. Krafick*, 663 a.2d 365, 374 (Conn. 1995); *Kikkert v. Kikkert*, 427 A.2d 76, 79 (N.J. App. Div. 1981); *In re Marriage of Selinger*, 814 N.E.2d 152, 162 (Ill. App. 2004).

³ *Symposium*, 76 NOTRE DAME L REV 1281 (2001)

⁴ This article is intended to include the co-parenting issues of formerly married, currently divorcing, and never married couples, including gay and lesbian couples. To recognize this diversity, I will use the term “post-dissolution.” However, the vast majority of relocation disputes I researched involved divorced couples, and none involved a gay or lesbian couple.

engagement in the parenting process. The increasing recognition given to dual parenting post-dissolution has consequences not only for children, but for their parents as well. Parents are strongly encouraged, through judicial programs, parent education programs, and numerous books and websites, to develop co-parenting plans. Many courts favor the parent most likely to allow the children frequent and continuing contact with the other parent.⁵

Co-parenting, however, may require significant accommodation to and contact with the other parent. Even with a relatively fixed schedule for residential time, parents must negotiate attendance at family events, vacation schedules, and other special events. They must communicate about school, extra-curricular activities and other issues. Joint legal custody, now common, requires that they communicate and make important decisions concerning their children together.

Through these co-parenting relationships, whether voluntary or court-ordered, divorced and separated individuals may continue to be closely enmeshed in each others' lives. Their parenting relationship thus prevents them from obtaining the "clean break" envisioned by the drafters of the Uniform Marriage and Divorce Act and many state property and alimony laws.⁶

To date these conflicting approaches to the post-divorce family have developed with little attention paid to the tensions between them. On the one hand, judges are encouraged to treat divorcing parties as separate individuals whose financial affairs must be separated and who will become essentially legal strangers to each other. But on the other hand, parents are increasingly encouraged to enter into post-dissolution co-

⁵See, e.g., 23 Pa. C.S.A. §5303(a)(2)(West 2001 & Supp. 2006).

⁶ Cynthia Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513, 1539 (2005).

parenting arrangements that deeply intertwine their lives and limit their decision-making authority not just about their children, but about their own lives as well. I explore a context in which the tension between these two models is most acute: relocation disputes.

Custody relocation doctrine limits the geographic mobility of primary residential parents, a restriction not placed on non-custodial parents or parents with significantly less residential time.⁷ In most states, custodial or primary residential parents must notify the other parent of their intent to relocate. If the other parent does not consent, the primary parent must obtain judicial permission to relocate. Relocation disputes have increased greatly over the last 25 years.⁸

Although legal standards vary, most states attend to one primary issue: is the relocation in the best interests of the child? Courts are asked to evaluate whether children's best interests are served by having their parents in close proximity, or having their parents at a great distance from each other. In many states, the effect of a denial on the parent is either ignored or is treated as a lesser concern. In a substantial percentage of cases, judicial permission to relocate is denied.

But an exclusive focus on the best interests of the child obscures the fact that denying permission to relocate imposes great personal and economic cost on parents

⁷ *Leoni v. Leoni*, 2005 WL 3512658, at *2 (Conn. Super. 2005) (“A non-custodial parent is perfectly free to remove himself from a jurisdiction despite the continued residency there of his children, in order to seek opportunities for a better or different lifestyle for himself.”). There is no easy term available to address the wide range of custodial arrangements presented in these relocation disputes. For the sake of consistency, I will refer to the parent with equal or greater custodial time who seeks to relocate as the “custodial parent” and the parent with equal or lesser custodial time who opposes relocation as the “non-custodial parent.”

⁸ A search on Westlaw for “relocation & custody” for the following years reveals the trend towards greater litigation in this area: for 1980, there were 28 case results, 1985, 51 results, 1990, 70 results, 1995, 127 results, 2000, 190, and for 2005, 331. While not every case that fits these search terms is a family law custody relocation dispute, most are, and the growth in the number of these disputes is striking. (Search conducted on Westlaw by author on June 13, 2006).

whose relocation plans are thwarted.⁹ As demonstrated more fully below, parents seek relocation for a variety of reasons: remarriage or new relationships; employment or education opportunities for them or their new spouse or partner; supportive family or better community environments; or, in some cases, to escape a stressful, controlling or violent ex-spouse or ex-partner. Denying permission to relocate could significantly diminish their lifetime earnings, perhaps making the difference between a comfortable lifestyle and retirement or living on the verge of poverty. Refusing to allow relocation in cases involving remarriage or family may involve significant non-economic losses as well.

Where a court permits a parent to relocate, it may recognize the additional costs that would be imposed on the non-relocating parent to visit and stay in touch with the children. Courts may allocate some or all of those additional costs to the relocating parent. However, no economic remedy is available to a parent denied the right to move. Instead, any lost economic opportunities are viewed simply as a sacrifice that parents make for their children. This sacrifice is not evenly shared, however: only primary residential parents are denied the right to make geographic moves to better their lives, only they are required to sacrifice to support the other's parenting.¹⁰ In the cases reviewed for this Article, ninety percent of custodial parents seeking to relocate were women. The deeply gendered nature of these disputes cannot be ignored.

One approach to the tensions between the clean break and co-parenting models would be to emphasize a more individualist approach to the post-dissolution family.

⁹ This economic cost has been acknowledged by some courts. See, e.g., *Leoni v. Leoni*, 2005 WL 3512658, at *2 (“Prohibiting the move by the custodial parent . . . can be severely detrimental to the psychological and economic well-being of the parent over many years”).

Judicial intrusion into the life of the post-dissolution family would be minimal, and decisions to relocate would rest squarely in the hands of the individual custodial or primary residential parent. Under this approach, divorced or separated parents would be far more independent of each other, and children would be considered rooted in their primary residential family. Judicial decision-making would be limited to determining whether circumstances warrant modification of custodial arrangements post-relocation and how to best allocate the additional costs arising from the new long distance parenting arrangement. This approach has the benefits of the clean break model, allowing divorcing or separating parents to each move on to new lives. It has the significant detriment, however, of de-emphasizing the relationship between the child and the parent who does not have primary residential time, which could be a significant loss for some children and parents.

A second method to resolving this tension would continue to emphasize interdependence in the post-dissolution family. This approach may improve the child's ability to remain in close contact with both parents, but it imposes significant costs on the divorced parents - in particular, on custodial and primary residential parents whose freedom to relocate is restricted. The interdependence approach requires us to recognize that shared parenting post-dissolution is not cost-free, and that the costs are not solely between parent and child. Instead, the interdependence model requires the primary residential parent, most often the mother, to make decisions that support the ex-partner's parenting. Decisions that support the other parent's relationship with the child can have serious economic consequences, re-linking together the futures of divorced spouses or

¹⁰ This does not mean that both parents, post-dissolution, may not make choices to support the other parent's relationship with the child. Here, I am focused on the use of state power to restrain moves that parents wish to make.

separated cohabitants for many years. These costs fall most heavily on women, who are most commonly the primary caregivers after dissolution and who also experience more economic hardship post-dissolution. The interdependence approach requires us to recognize and remedy these economic consequences.

While relocation cases are important in their own right, they are also a proxy for larger trends in contemporary family law. Our legal culture is at a crossroads at which, as a matter of family law policy, we need to evaluate fully the implications of the clean break and co-parenting models, and the consequences of these conflicting models for the financial aspects and custody aspects of family dissolution. This Article examines one aspect of the economic consequences of post-dissolution co-parenting - restrictions on relocation - and considers the possibility of post-divorce economic adjustments to accommodate economic losses that arise in order to keep the two parents within easy reach of their children as is one step in that larger evaluation process.

Part I of this Article examines the clean break model. Part II describes the developing post-divorce co-parenting model. Part III describes relocation doctrine and examines the economic concerns that motivated many requests to relocate. It analyzes the limited set of choices available to judges facing relocation disputes, including the lack of a remedy for the economic losses attendant to a denial of permission to move. It also examines the complicated issues that accompany such recognition.

I. Getting Away: The “Clean Break” Theory of Divorce

The gendered experience of the economics of divorce is shaped by gender difference in workforce participation during marriage and the responsibilities of parenting after divorce. Divorce, by removing the economic sharing that characterizes marriage,

often exposes the economic vulnerability of women and the children in their care. This economic vulnerability may be heightened by the theoretical underpinnings of our approach to the economics of divorce, an approach that has garnered criticism from many sources but remains in force today.

The revolution in the work lives of women has been both dramatic and incomplete. In 1975, 47% of women with children under the age of 18 were working either part-time or full-time.¹¹ By the year 1995, the numbers were dramatically different – 46% of mothers worked full time, 19% worked part time, and 34% were engaged in full-time caregiving in their homes.¹² Despite the dramatic rise in employment among mothers, 55% of married women with children are not employed full time, and most of them are financially dependent on their husbands. They are thus economically vulnerable if their marriages terminate. These numbers have tremendous gender implications. While in 2003, approximately six million married women stayed at home fulltime to care for their home and family, only 15,600 married men stayed out of the labor force for the same reason.¹³

Most divorces happen within ten years of the marriage.¹⁴ Almost sixty percent of women getting divorced lived with their minor children at the time of divorce.¹⁵ Most divorcing women have children to care for, and many of those women enter divorce

¹¹ Elaine L. Chao & Kathleen P. Utgoff, U.S. BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, *WOMEN IN THE LABOR FORCE: A DATABOOK* __ (2005).

¹² *Id.* at Table __. Women with children under the age of three were least likely to be employed full time – only 35% worked full time, another 19% part time, and 46% were full time caregivers. Those with children ages 6 – 17 were most likely to be employed full time. Data for married mothers was similar: 45% worked full time, 22% part time, and 33% were full time caregivers. *Id.* at Table __)

¹³ U.S. Census Bureau, *America's Families and Living Arrangements: 2003*

¹⁴ From 1990-1994, 30.6% of women's first marriages ended within 5 years and another 28.7% lasted between 5-10 years. U.S. Census Bureau, Economics and Statistics Administration, U.S. Dept. of Commerce, *Number, Timing, and Duration of Marriages and Divorces: 2001* at 11 (2005), *available at* <http://www.census.gov/prod/2005pubs/p70-97.pdf>.

¹⁵ *Id.* at 13.

without a current, full-time job to ensure their financial stability. Divorced women raising children are more likely than single women without children to file for bankruptcy.¹⁶

At divorce, there are two sources of financial arrangements available between spouses. The first approach, preferred by many legislatures and courts, is to distribute all marital property. Community property states distribute marital property evenly. All other states distribute marital property under the doctrine of equitable distribution, which generally considers a wide range of factors. In some states an even split is the presumed starting point for such distribution, while in others, the court is to be guided by the factors listed for consideration.

Couples who divorce when they have minor children, however, rarely have many assets available for distribution.¹⁷ This often leaves the parties in very different economic circumstances. Often the husband leaves the marriage with more human capital – a greater ability to earn money in the workforce. Many women, on the other hand, leave the marriage with less human capital – with fewer skills valued in the workforce. Women also tend to have a greater amount of the post-divorce child care responsibilities, which often limits their ability to greatly increase their income post-divorce. While the extent of post-divorce economic disadvantage of women is disputed, as are its primary causes, it is widely agreed that women do experience economic disadvantage relative to their ex-husbands.

¹⁶ Elizabeth Warren, *Families Alone: The Changing Economics of Rearing Children*, 58 OKLAHOMA L. REV. 551, 552 (2005)(reporting that divorced women with children are three times more likely to file for bankruptcy than single women without children).

¹⁷ Starnes, *supra* note 4, at 1516.

Despite this disadvantage, few courts have adopted calls to consider the increased human capital of one spouse a form of property subject to distribution upon divorce.¹⁸ Their refusal to do so has been based largely on a reluctance to impose any restrictions on the future career path of the spouse with the greater level of human capital at the time of divorce.

The other remedy available at the time of divorce to achieve economic justice between the parties - alimony - is often quite restricted. Alimony was historically granted in only a limited number of cases.¹⁹ Since the late 1970's, the rhetoric of alimony has shifted to the rhetoric of rehabilitation. It is tailored to give the ex-spouse a relatively short period of time in which to gain job training, further education, or work experience in order to become economically self-sufficient.

The underlying notion is that the parties to a marriage should be encouraged to leave the marriage without any lingering economic ties, and that each should be economically self-sufficient post-divorce.²⁰ The "clean break" approach to divorce is reflected in the Uniform Marriage and Divorce Act ("UMDA"), adopted in the early 1970's. It is based on a partnership concept of marriage, under which the parties are expected to share in the property gained during the marriage, but from which the parties should also be able to walk away unencumbered.²¹ It provides that alimony be granted only where the spouse seeking support "lacks sufficient property to provide for his reasonable needs" and "is unable to support himself through appropriate employment."²²

¹⁸ Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WICS. WOMEN'S L.J. 141 (2004)

¹⁹ Jana Singer, *Divorce Reform and Gender Justice*, 67 N.C.L. REV. 1103, 1106-07 (1989).

²⁰ Kelly, *supra* note 9 at 166; Starnes, *supra* note 4, at 1539.

²¹ Uniform Marriage and Divorce Act Prefatory Note, 9A UNIF. L. ANN. 159, 161 (1979)[hereinafter UMDA]

²² UMDA §308, 9A UNIF. L. ANN. At 446.

Maintenance is available under the Act only for as long as needed for the spouse to become self-sufficient. This section of the UMDA has influenced the approach to alimony in most jurisdictions.²³

Current approaches leave women and the children they care for experiencing on average a 30% decline in their standard of living after a divorce.²⁴ The economic inequality of marital partners post-divorce, and the gendered nature of that economic inequality, has received extensive attention in family law literature.²⁵ Some authors have proposed changes to our concept of property in order to reduce the economic impact of divorce. They assert that the human capital of each spouse should be taken into account at the time of divorce.

A different approach was adopted by the American Law Institute's *Principles of the Law of Family Dissolution*.²⁶ It defines spousal support as a form of compensation for the loss of earning capacity related to the marriage, for example, because of the decision to have one spouse remain at home to care for minor children while the other spouse becomes the primary wage earner. Some states have adopted this justification for spousal support, which recognizes sacrifices made during the marriage but ignores those that may be required after dissolution.²⁷

Other scholars have argued for a communitarian approach to marriage, one that emphasizes communal values during marriage. Milton Regan argues that spouses have

²³ Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM L. Q. 573, (1988); C.L. Greene, *Alimony Is Not Forever: Self-Sufficiency and Permanent Alimony*, 4 AM. ACAD. MATRIM. L. 9, (1988); Brett R. Turner, *Spousal Support in Chaos*, 25(4) FAM ADVOC. 14 (2003).

²⁴ Kelly, *supra* note 13, at 160.

²⁵ See, e.g., Kelly, *supra* note 13; Starnes, *supra* note 4.

²⁶ American Law Institute, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS*, ch.5 (2002)

²⁷ Mary Frances Lyle & Jeffrey L. Levy, *From Riches to Rags: Does Rehabilitative Alimony Need to be Rehabilitated?*, 38 FAM. L. Q. 3, 12 (2004).

“a special duty of care to each other that may entail some financial claims and obligations for a period of time after divorce”²⁸ These duties are not, however, related to the ongoing work of raising children, or the economic costs of post-dissolution co-parenting.

Despite these efforts to “rehabilitate” alimony, the clean break theory continues to dominate judicial approaches to alimony, which generally either deny alimony or restrict it to short periods of time except for lengthy marriages.

The remedy of alimony is also strictly limited to the time of divorce. A spouse who does not seek alimony during the pendency of the divorce action is barred from seeking alimony after the divorce is final. Post-divorce changes in circumstances, such as remarriage or cohabitation, may lead to the modification or termination of an alimony award.²⁹ Unexpected post-divorce changes cannot, however, lead to the creation of a new alimony obligation.

Recently, Cynthia Lee Starnes has articulated a different rationale for income sharing that includes the post-divorce time period.³⁰ She proposes a “parenting-partnership” model which requires income sharing during “the unfinished parental work of raising minor children.” She argues that if one parent assumes a disproportionate share of the parenting work, then the parents should employ equal income sharing in order to fairly balance the burdens and benefits of the parenting partnership.³¹ This income sharing would be in addition to any share that a spouse would receive upon divorce. While Professor Starnes does not discuss the implications of her approach for unmarried parents, her analysis could be extended to include them as well.

²⁸ Milton C. Regan, Jr., *Alone Together: Law and the Meanings of Marriage* 161 (1999).

²⁹ Cynthia Lee Starnes, *One More Time: Alimony, Intuition, and the Remarriage-Termination Rule*, 81 IND.L.J. 971, 977-78 (2006); see, e.g., 23 Pa. C.S.A. §3701(e); §3706 (cohabitation with non-related member of the opposite sex bar to award of alimony).

³⁰ Starnes, *supra* note 4, at 1518.

To date, none of the proposals to rethink the clean break norm – through human capital theory, compensation models, communitarianism or parenting partnership theory – have focused on the possibility that the emerging norm of co-parenting may be transforming the post-dissolution landscape. This research on relocation disputes is just one small step towards consideration of this larger issue.

Despite proposals that would increase the award of alimony at the time of divorce or encourage ongoing income sharing during the minority of the couple’s children, economic separation continues to be the dominant approach to the economic interests of divorced couples. This stands in marked contrast to the increasing integration of the post-divorce family in the context of child custody.

II. Staying Involved: The Rising Emphasis on Post-Divorce Co-Parenting

Through a multitude of media, separating and divorcing parents are exhorted to put aside their differences in order to effectively “co-parent” their children. This message comes through books for divorcing parents, state laws, court-related materials and educational programs, professionals, and others. While these materials may be written in non-gendered language, most acknowledge that co-parenting is aimed at keeping fathers in the lives of their children after divorce. Little attention is given to the effect that co-parenting may have on the quality of life for parents, and in particular, custodial parents who must make more of the accommodations.

Popular books on divorce emphasize the importance of co-parenting to the children and provide parents with strategies for achieving successful co-parenting.³²

³¹ *Id.* at 1550-1552.

³² See, e.g., Daniel McClure and Jerry B. Saffer, *Wednesday Evenings and Every Other Weekend: From Divorced Dad to Competent Co-Parent: A Guide for the Noncustodial Father* (2000); Elizabeth Thayer &

They emphasize the benefits to children of secure attachments to both of their parents post-divorce. Noted psychologists echo this message in their writings directed towards divorcing parents.³³

A number of social science scholars emphasize the importance to children of maintaining close ties to both parents following separation or divorce. They highlight studies that show that a close relationship with both parents is related to a positive adjustment after divorce.³⁴ This demonstrates a change from the dominant view in the 1970's, when Goldstein, Freud and Solnit's influential book, *Beyond the Best Interests of the Child*, articulated the view that children required one psychological parent, and advocated for courts to give full authority to that one parent.³⁵ Their views were used to support the sole custody approach to post-divorce parenting roles.

Newer psychological scholarship, along with effective advocacy by "fathers' rights" groups, has led to major changes in state law. In 1979 California led the way in passing a joint custody statute.³⁶ Now, most states permit joint custody, and twelve states

Jeffrey Zimmerman, *The Co-Parenting Survival Guide: Letting Go of Conflict after a Difficult Divorce* (2001); Craig Everett & Sandra Volgy Everett, *Healthy Divorce: For Parents and Children - - An Original, Clinically Proven Program for Working Through the Fourteen Stages of Separation, Divorce and Remarriage* (1998).; Stanton Samenow, *In the Best Interest of the Child: How to Protect Your Child from the Pain of Your Divorce* (2002); Melinda Blau, *Families Apart: Ten Keys to Successful Co-Parenting* (1995), Isolina Ricci, *Mom's House, Dad's House: Making Two Homes for Your Child* (1997).

³³ See, e.g., Robert E. Emery, *The Truth About Children and Divorce: Dealing with the Emotions So You and Your Children Can Thrive* (2004); Joan B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce*; E. Mavis Hetherington & John Kelly, *For Better or For Worse, Divorce Reconsidered* (2002).

³⁴ Paul R. Amato, *Life Span Adjustment of Children to Their Parents' Divorce*, 4 *FUTURE OF CHILDREN* 143, 150 (1994); Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 *FAM. & CONCILIATION CTS. REV.* 297 (2000)

³⁵ Joseph Goldstein, et al, *Beyond the Best Interests of the Child* (1973).

³⁶ North Carolina had enacted a joint custody statute in 1957, and some other state courts had determined that their broad equitable powers permitted them to order joint custody. However, the California legislation signaled the beginning of widespread legislation regarding joint custody. June Carbone, *From Partners to Parents: The Second Revolution in FAMILY LAW* 182 & n. 7 (2000).

and the District of Columbia have some form of presumption of joint custody.³⁷ Joint legal custody is now the norm rather than the exception.³⁸ Joint physical custody has also gained traction. Joint physical custody does not necessarily mean that parenting time is equally split.³⁹ In most states, a primary residence for the children is identified. In a few states, equal sharing of parenting time is identified as the presumptive starting place for a court's decision-making. At the least, most state custody laws now explicitly identify ongoing contact with two parents as a major policy goal of the child custody statute.⁴⁰ Many also include as a factor in determining custody which parent is more likely to encourage a relationship between the children and the other parent, so-called "friendly parent" provisions. Courts have echoed the importance of close involvement by both parents.

These changes have been recent, and empirical scholarship lags behind, so as yet there is no research that demonstrates conclusively that children do see their fathers more often than they did thirty years ago. The available research places estimates of joint custody in the range of 12 – 24%, but that research is more than ten years old.⁴¹ In most of the relocations reviewed for this Article, however, both parents were spending significant amounts of time with their children.

Lawyers, psychologists and other professionals involved in working with families experiencing separation or divorce often endorse the emphasis on the co-parenting relationship following divorce. A number of scholars have designated ensuring that both

³⁷ Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 337 n. 59 (collecting statutes); A.L.I., supra note 19, §2.08, rptr's notes cmt. a, at 211. Iowa and Maine both have joint custody presumptions. Iowa Code §598.41 (2004); Me. Rev. Stat. Ann. tit. 19-A §1653 (2001). States that provide for but do not expressly favor joint custody include Oregon, Or. Rev. Stat. §107.179 and Pennsylvania, 23 Pa C.S.A..

³⁸ Carbone, supra note 36, at 184.

³⁹ A.L.I., supra note 19, §2.08, rptr's notes cmt. j, at 230-31.

parents stay actively involved in the lives of their children as the primary task for professionals working with families going through family dissolution.

Advocates for shared parenting have identified parental conflict as the primary impediment to shared parenting and have generated a range of proposals for reducing the level of parental conflict.⁴² They argue that the adversarial legal system encourages parents to engage in long-term conflict.⁴³ For example, they argue that the “best interests” test used by many courts stimulates parents to identify and highlight weaknesses in the other parent’s parenting skills in order to gain an advantage in a custody dispute. They also argue that the structure of dispute resolution employed in the adversarial system is antithetical to the important goal of reducing parental conflict. Rather than working together to design an approach to post-divorce parenting, the adversarial system encourages each parent to view the other parent as the litigation “enemy.”

The goal of ensuring active engagement by both parents has led to a variety of approaches to reduce parental conflict and encourage such involvement. One such method is parent education classes. These classes are designed to educate parents about the effect of divorce on children, and to encourage both parents to remain attached to their children as their relationship with each other dissolves. They often attempt to provide parents with the perspective of the “other” parent to help parents see their conflicts from a stance other than their own. In some states, attendance at these programs is now mandatory. In other states, they are increasingly encouraged by local courts.

⁴⁰ See, e.g., 23 Pa. C.S.A.; Iowa Code §§598.1(1), 598.41(1).

⁴¹ Joan B. Kelly, *The Determination of Child Custody*, 4 THE FUTURE OF CHILDREN 121, 124 (1994).

⁴² Joan B. Kelly, , *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL’Y & L.129 (2002)

Another approach to encourage active engagement by fathers after divorce is the parenting plan. Several states now require parents to attempt to work with each other to develop a parenting plan prior to any court hearing. A parenting plan generally includes each parent's decision-making responsibilities, a specific time schedule for each parent to have parenting time, and methods of communication and dispute resolution to be employed by the parents. Several states have now made information about parenting plans available on the internet, and web-based companies provide parents with assistance in developing and carrying out such plans.

Parents who are unable to develop a parenting plan together without more assistance are encouraged, or in some jurisdictions, required, to attend mediation sessions. Mediation is viewed by many professionals as an approach that allows parents to reach agreement on difficult issues in a manner that makes them more inclined to comply with their agreements. In jurisdictions without formal mediation programs, masters and judges often meet with the parents to help them resolve their dispute without a hearing or judicial decision. Many of those favoring mediation programs emphasize their ability to encourage parents to engage in co-parenting post-divorce.

Some family lawyers have also adopted methods designed to encourage parents to reach agreement and keep both parents involved in the lives of their children. While some lawyers employ traditional negotiation methods to achieve such results, other lawyers have joined the "collaborative lawyering" movement.⁴⁴ Under this approach, clients must explicitly agree that their goal is to achieve a resolution of their dispute without recourse to litigation. The lawyer is hired solely for purposes of achieving such a

⁴³ See, e.g., Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practices*, 10 VA. J. SOC. POL'Y & L. 129, 131 (2002)

⁴⁴ John Lande & Gregg Herman, *Fitting the Forum to the Family Issues*, 42 FAM. CT. REV. 280 (2004).

resolution, and the client must agree to find new counsel if they fail to reach an agreement and enter the litigation process.

Assistance for post-divorce parenting has become a cottage industry. Besides the numerous books now available, there are a variety of web-based companies to assist parents to develop and adhere to shared parenting time plans and to facilitate communication about important issues.⁴⁵ New services have also been created. In order to enable contact between parents who have committed abuse or violence against either their partner or their children, supervised visitation programs are now available. Where parents are unable to transfer their children from one parent to the other without risk or open conflict, courts may require the use of child transfer locations, where one parent may drop off their children and leave before the other parent arrives.⁴⁶ In some cases, parent coordinators are hired to mediate between two parents who have engaged in ongoing conflict.⁴⁷

These elaborate (and sometimes expensive) schemes to ensure that under most circumstances child will still have significant contact with both parents reflects an evolving and important shift in societal beliefs about post-divorce families.⁴⁸ Earlier psychological and popular literature emphasized the importance of having one primary attachment figure, usually the mother, reflected in an explicit or implicit “tender years presumption.” The tide has shifted to emphasize the child’s position following divorce as a member of two interconnected households.

⁴⁵ See, e.g., ShareKids.com, ParentingTime.net www.coparenting.com, (need to visit, identify date of visitation, do a brief description)

⁴⁶ See, e.g., Peter G. Jaffe, et al., *Parenting Arrangements After Domestic Violence*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 81 (2005).

⁴⁷ Dana E. Prescott, *When Co-Parenting Falts: Parenting Coordinators, Parents-in-Conflict, and the Delegation of Judicial Authority*, 20 MAINE BAR J. 240 (2005).

The scholarly literature and popular media debate whether this emerging interdependent vision of post-divorce families is either realistic or beneficial to children. Rather than enter into that debate here, I want to focus on a somewhat different question: what are the consequences of maintaining two conflicting approaches to divorce: clean break for economic issues, interconnection for child custody issues? In order to highlight this issue, I examine disputes concerning relocation.

III. Where “Clean Break” and Co-Parenting Collide: Relocation Disputes

Relocation disputes have risen dramatically in recent years. They primarily develop after divorce, when the parent who has primary custody or is the primary residential parent, usually the mother, seeks to move away from the other parent. They can, however, arise during divorce proceedings, or between never married parents as well. States vary widely in their approaches to these disputes, and in most states, the outcome of any dispute is far from certain. To date, while a good deal of attention has been paid to the doctrinal choices available to resolve these disputes, little attention has been given to the reasons why custodial parents seek relocation or how to ameliorate the consequences of denying them permission to relocate.

“Move away” cases take place in a society that has long been highly mobile. Approximately 6% of the U.S. population moves each year, and 6.6% of divorced and separated individuals move out of their home county each year.⁴⁹ Geographic mobility

⁴⁸ Theresa Glennon, *Mobility and the Post-Divorce Family: Resolution of Relocation Disputes in the U.S.*, in COMMON CORE AND BETTER LAW IN EUROPEAN FAMILY LAW 193, 199-202 (ed. Katharina Boele-Woelki, 2005).

⁴⁹ U.S. CENSUS BUREAU, *Geographical Mobility: 2002 to 2003, Current Population Reports, Table A* (March 2004). Approximately 6% of the U.S. population moves a significant distance each year. Divorced and separated persons move outside their home county at a slightly higher rate, 6.6 percent. *Id.* at Table B. Some estimate that 25% of custodial parents move within four years of a divorce. Sanford Braver, et al.,

has been further increased by a number of economic and technological developments. Most workers now change jobs regularly, either due to lay offs or the search for a better job. Some parts of the country have witnessed tremendous job growth, while others have either lost jobs or rates of employment have barely kept pace with demographic trends. The internet makes it easier to locate jobs in different geographic locations and increases the number of long distance romances which may lead to relocation by one of the partners.

Despite the increase in litigation regarding relocation, most families do not seek judicial intervention. Some parents may simply give up their intent to relocate in order to avoid conflict, or because new jobs or new relationships may not be able to withstand the test of lengthy court procedures. Where parents do relocate, they may work out a different visitation schedule, focusing on fewer but longer visits for the non-custodial parent. They may also use new technologies, such as virtual visitation through webcams and instant messaging, to keep in touch.⁵⁰ Relocation disputes may not reach the courts because parents lack the resources to either obtain permission to move or to contest such a decision. In addition, non-custodial parents do not need permission from the other parent or courts to move, so litigation is limited to proposed moves by parents with sole, primary or equally shared custody.⁵¹ Given the high rates at which mothers have primary custody, these disputes typically involve fathers seeking to prevent relocation by mothers.

Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations, 17 J.FAM. PSYCHOL. 206 (2003).

⁵⁰ Sarah L. Gottfried, *Virtual Visitation: The New Wave of Communication Between Children and Noncustodial Parents in Relocation Cases*, 9 CARDOZO WOMEN'S L.J. 567 (2003).

⁵¹ Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 U. LOUISVILLE J. FAM. L. 791, 839-40(1992).

There is no empirical research available on post-divorce parents with regard to the issue of relocation. Therefore, we have no survey material available to determine why custodial or non-custodial parents may not seek to relocate, and what effect statutory and judicial approaches to relocation, which generally require notice to the other parent and either consent from the other parent or judicial permission, have on post-divorce parents, especially custodial mothers. The only information available is located in judicial opinions regarding relocation. Thus, this Article includes a review of all state judicial opinions rendered during the period of time from June 1, 2001 to June 1, 2006 and available on Westlaw. While these do not provide statistically valid information, they do provide a wealth of “case stories” that can inform us as to some of the reasons for which parents seek relocation and provide some insight into the economic consequences of relocation.

Relocation Doctrine

Relocation disputes have spawned their own particular doctrine. While a small number of states continue to decide relocation disputes under custody modification doctrine,⁵² most states have developed a doctrinal approach that is specific to relocation disputes. Many states now require the parent who seeks to change the child’s principal residence to provide notice to the other parent.⁵³ In most states, courts will adjudicate any relocation dispute in which the relocation would significantly interfere with the current arrangement of parenting time.⁵⁴

⁵² Alaska Stat. §25.24.150(c) (Lexis Nexis 2004); Ind. Code Ann. §31-17-2-23 (West 1999 & Supp. 2005); *In re Marriage of Thielges*, 623 N.W.2d 232 (Iowa Ct. app. 2000); Kansas .S.A. §60-1620 (); *Fenwick v. Fenwick*, 114 S.W.3d 767 (Ky. 2003);

⁵³ Ala. Code 1975 §30-3-165 (LexisNexis Supp. 2005)(effective Sept. 1, 2005); Ariz. Rev. Stat. Ann. §25-408(G) (West 200 & Supp. 2005); .

⁵⁴

State approaches to relocation fall in several broad categories: states that place the burden of proof on the parent seeking relocation to demonstrate that the move is in the child's best interests,⁵⁵ those that place the burden of proof on the parent opposing relocation to demonstrate that the move harms the child's best interests,⁵⁶ and those that have adopted a neutral best interests test.⁵⁷

These broad categories fail to capture the diversity of state approaches to relocation. For example, Arkansas employs a presumption favoring relocation for custodial parents with primary custody; in order to rebut the presumption, the noncustodial parent must demonstrate that relocation is detrimental to the child's best interests.⁵⁸ Tennessee permits a parent with substantially more of the parenting time to relocate with the child unless the relocation does not have a reasonable purpose, poses a threat of specific and serious harm to the child, or the relocating parent's motive is vindictive. If one of those criteria is met, or if the parents share substantially equal parenting time, the court must determine whether relocation is in the child's best interests.⁵⁹

Connecticut uses a burden shifting approach. After the custodial parent meets an initial burden of showing that the relocation is for a legitimate purpose and is reasonable in light of that purpose, the burden shifts to the non-custodial parent to prove that

⁵⁵ Ala. Civ. Code §30-3-169.4; Haw. Rev. Stat. Ann. §571-46 (LexisNexis 2006); *Roberts v. Roberts*, 64 P.3d 327 (*Id.* 2003); Ill. Comp. Stat. Ann. 5/609 (West 1999 & Supp. 2006); La. Rev. Stat. 9:355.13 ();

⁵⁶ *Hollandsworth v. Knyzewski*, 109 S.W.3d 653 (Ark. 2003); Cal. Fam. Code §7501 (West 2004 & Supp. 2006); Conn. Gen. Stat. Ann §46b-56 (West 2004 & Supp. 2006 Supp.)(parent seeking relocation bears initial burden of proof to demonstrate that relocation is for legitimate purpose and proposed location is reasonable in light of the purpose; then nonmoving parent bears burden to demonstrate that move is contrary to child's best interests); Wash. R.C.W. 26.09.520 (revised 2000).

⁵⁷ Colo. Rev. Stat. §14-10-129(2)(c) (LexisNexis 2004); *Karen J. M. v. James W.*, 792 A.2d 1036 (Del. Fam. Ct. 2002); Fla. Stat. Ann. §61.13 (West 2006); *Bodne v. Bodne*, 588 S.E.2d 728 (Ga. 2003);

⁵⁸ *Hollandsworth v. Knyzewski*, 109 S.W.23d 653 (Ark. 2003).

relocation is not in the child's best interests. Iowa employs custody modification doctrine to place a heavier burden of proof on the non-relocating parent seeking primary custody to prevent the child from relocating. The noncustodial parent must prove that the move is a substantial change and that he has an ability "to minister more effectively to the children's well-being."⁶⁰

Florida has adopted a neutral best interests approach that requires the court to consider various factors, including whether the move is likely to improve the general quality of life for both the residential parent and child and whether the move is in the best interests of the child. It specifically states that "[n]o presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact and access with the secondary residential parent."⁶¹

In New York the relocating parent has the burden of proof to demonstrate that the move is in the best interests of the child.⁶² Parents seeking to relocate from Pennsylvania must demonstrate that the move would substantially improve the quality of life for the parent and child along with good faith motive, and realistic, substitute visitation arrangements with the non-custodial parent.⁶³

These varied approaches have in common an emphasis on the best interests of the child. The states are even more mixed regarding the extent to which courts are to give

⁵⁹ Tenn. Code Ann. §36-6-108(d),(e). Where the parents are spending "substantially equal" amounts of time with the child, the court must determine whether the requested relocation is in the best interests of the child.

⁶⁰ *In re Marriage of Thielges*, 623 N.W. 2d 232, 235 (Iowa 2000).

⁶¹ Florida Statutes 61.13(2)(d).

⁶² *Matter of Groover v. Potter*, 792 N.Y.S.2d 693 (3 Dep't 2005).

⁶³ *Gruber v. Gruber*, 583 A.2d 434 (Pa. Super. 1990).

any weight to the interests of the parent seeking relocation, or whether they view the parent's well-being as important to the well-being of the child.

Some states treat the parent's well-being as an independent factor requiring judicial consideration. The Washington Child Relocation Act, for example, shifted judicial analysis from the best interests of the child to a shared focus on the child's and parent's interests.⁶⁴ Other states take the parent's well-being into account indirectly, by finding the child's interests to be interwoven with the interests of the primary custodial parent.⁶⁵ In other states, however, the focus is on the best interests of the child, and that focus may center on the possible disruption a move would cause to the child's relationship with the non-custodial parent.

Most judicial decisions end with a decision to either grant or deny the custodial parent permission to relocate. Little, if any, attention is given to the effect of a denial of relocation on the custodial parent. In order to begin to identify the economic impact of relocation disputes on parents with primary custody, this Article reviews relocation decisions to identify what kinds of opportunities would lead custodial parents to seek permission to relocate.

The Available Research Base

There is no readily available set of information on the wide range of reasons why custodial parents seek permission to relocate. There is no centralized recording of relocation disputes or their outcomes in this country. Given the absence of empirical research on this issue, I used case decisions regarding relocation disputes available on Westlaw for the five year period from June 1, 2001 to June 1, 2006. This approach

⁶⁴ R.C.W. 26.09.520 (revised 2000).

imposes numerous limitations. Because in most jurisdictions the cases available on Westlaw are limited to appellate court decisions, the research eliminates disputes that are filed but resolved before adjudication or reach a decision only by a trial judge. In addition, states may have different practices regarding which appellate decisions are made available to Westlaw for publication, so the research does not necessarily include all appellate court decisions rendered in the five year period under study. While decisions reported on Westlaw do not provide a representative sample of all relocation disputes, they do, however, provide a rich source of information on relocation disputes and a natural starting place for analysis of this issue.⁶⁶

What can we learn from researching judicial opinions on relocation? First, these decisions are important to practitioners and litigants who look to them to determine the direction of relocation case law in their jurisdictions. Second, a review of such a large number of cases does give us insight into the reasons why custodial parents seek to relocate, and how hospitable courts have been to their petitions. The stories of custodial parents allow us to begin an examination of the effect of relocation doctrine on the lives of custodial parents, and in particular whether we would expect those effects to have important economic consequences for those custodial parents. They also highlight the limited scope of judicial decision-making. Courts can grant or deny permission to relocate or modify custody to the non-relocating parent. They can also allocate any additional costs arising from the relocation, such as the costs of transportation or virtual visitation. In none of the cases reviewed, however, did courts consider whether a parent

⁶⁵ These courts have emphasized that the child indirectly benefits from the improvement of the general quality of life for the custodial parent. See, e.g., *Rosenthal v. Maney*, 745 N.E.2d 350 (Mass. App Ct. 2001); *In re Marriage of Collingbourne*, 791 N.E.2d 532 (Ill. 2003).

whose request for relocation was denied should be compensated for the lost economic opportunity. The concerns raised by this review should lead us to seek other sources of empirical research for the future.

Cases were identified through two methods. First, a search was done with “relocation & custody.” Second, cases were identified through key citation of relevant statutory provisions or case law. Only the latest court decision on the relocation issue in a particular case was included in the analysis.⁶⁷ Almost all of the cases were state appellate decisions. Through this method, 612 cases were identified in the fifty states and the District of Columbia.⁶⁸ Five jurisdictions had no decisions reported on Westlaw, and another 14 had fewer than five available decisions. The number of cases varied widely by state, from a handful with no judicial opinions, to Ohio with 49 and New York with 56. More than half of the reviewed decisions, therefore, came from eleven states: Arkansas, California, Connecticut, Florida, Iowa, Louisiana, Missouri, New York, Ohio, Pennsylvania and Tennessee.⁶⁹ These states represent a wide range of doctrinal approaches to custody relocation disputes.

Findings

Summary of Findings

⁶⁶ See, e.g., James R. Cohen & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006)(analyzing judicial decisions in challenges to mediation to identify issues arising out of mediations).

⁶⁷ Cases were identified by searching through each state case file on Westlaw for “relocation & custody,” and by checking citations to leading relocation cases or statutes in each state.

⁶⁸ While research was conducted on all fifty states and the District of Columbia, no cases were identified under the search criteria for the District of Columbia, Maine, Maryland, New Mexico and Utah. This may indicate a limited number of relocation disputes or it may reflect judicial and Westlaw decisions regarding publication. In addition, only one case was found in the following jurisdictions: Arizona, Oklahoma, South Dakota and West Virginia. Again, it is not clear why there was such a limited body of caselaw from these jurisdictions.

⁶⁹ The decisions from these eleven states constituted 62.1% of the cases reviewed. Arkansas had 31, California 46; Connecticut 37, Florida 23, Iowa 26; Louisiana 26; Missouri 35; New York 56; Ohio 49; Pennsylvania 21, and Tennessee 30. These were the only states that had twenty or more decisions.

In most jurisdictions, the outcome of a relocation petition is quite uncertain. Of the 612 cases located on Westlaw, an affirmative or negative decision on relocation was reached in 507, or 83% of the cases. The custodial parent was given permission to relocate in 40% of the cases reviewed, denied permission in 43% of all cases, and in 17% of the cases, the case was remanded for further proceedings.⁷⁰ Almost all of the remaining cases were remanded by the appellate court with instructions for the trial court to apply the proper legal standard.

Permission to move was granted in slightly fewer than half - 48% -of the cases in which a final decision was made.⁷¹ In states with 10 or more reported cases in which a decision was made, the range of permission to move was broad. In Virginia, permission to move was granted in all ten cases to reach a final decision, while in Delaware, permission to move was denied in 13 of the 17 decided cases. These states were outliers, however, and most states fell in the mid-range – approximately 35 – 65% of parents seeking to relocate were permitted to move. These results mean that for most parents entering litigation, the caselaw in their state is decidedly mixed, and they cannot be confident of the outcome.⁷²

Legal tests favoring the relocating parent often, but not always, resulted in more favorable decisions for the relocating parent. Of the eleven states with twenty or more

⁷⁰ State Relocation Chart, on file with author.

⁷¹ Final decisions were rendered in 507 cases. Of those, permission to relocate was granted in 244 cases and denied in 263 cases. *Id.*

⁷² For the eleven states with the largest number of cases, the percentages of parents permitted to relocate in cases with final decisions were as follows: Arkansas 57%; California 50%; Connecticut 56%; Florida 50%; Iowa 39%; Louisiana 54%; Missouri 56%; New York 41%; Ohio 46%; Pennsylvania 44%, Tennessee 58%. For other states that had at least ten cases reach a decision, the percentages of parents permitted to relocate were: Delaware 24%; Nebraska 40%; Texas 39%; and Virginia 100%. For states that had from five to nine decisions, percentages of parents permitted to relocate were as follows: Alabama 67%; Alaska 50%; Hawaii 50%; Illinois 63%, Indiana 33%, Kentucky 37%; Massachusetts 33%; Michigan 40%; Minnesota 33%; Mississippi 38%; New Jersey 67%; North Dakota 67%; Oregon 80%; Vermont 17%; Washington 50%. *Id.*

cases, three of the favoring states permitted 56-57% of custodial parents to relocate, one allowed 50% to relocate, while one, Iowa, allowed only 39% of custodial parents to relocate.⁷³ Florida, the neutral state, permitted 50% of parents to relocate. Of the states whose legal tests disfavored relocation, Missouri allowed 56% to relocate, Louisiana allowed 54% to relocate, Pennsylvania 44%, and New York only 41%.⁷⁴

The uncertainty of the outcome of relocation disputes itself creates economic consequences. In most jurisdictions, custodial parents would not be able to count on being able to relocate, and this uncertainty may make it hard to accept new offers of employment or make plans to live with a new spouse.

Gender

While this Article generally employs gender neutral language in recognition of the fact that some custodial parents were men, studies show that most custodial parents are women, and consistent with this, 90% of the parents in the relocation database seeking permission to relocate with their children were women.⁷⁵ Reasons for which moves were requested also varied some by gender. While both groups requested relocation for employment purposes at fairly high rates, men rarely sought relocation for remarriage or their spouses' jobs⁷⁶ Gender may have played some role in judicial decision-making: in the cases that reached a final decision, women were denied permission to relocate 45% of the time; men 49% of the time. While the greater impact

⁷³ State Chart of Relocation Disputes, on file with author, pp.1-3.

⁷⁴ *Id.* Most of the moves in the cases reviewed involved significant distances. Only 49 involved 100 miles or less; 178 involved 100 – 500 miles, and 360 of the cases involved more than 500 miles. These numbers make it appear that parents are more willing to litigate when the distance is substantial and would make frequent contact with the noncustodial parent extremely difficult. *Id.*

⁷⁵ Relocation Database, *supra* note p.3.

⁷⁶ Men's Reasons and Women's Reasons Charts, on file with author.

of relocation disputes on women primarily derives from their greater role as custodial parents, it is possible that there is also some gender bias in judicial decision-making. Both require further study.

Examining the Reasons Given for Relocation

The cases reviewed reveal the multitude of reasons why custodial parents seek to relocate, and the extent to which these reasons have important economic dimensions. Twenty-seven percent of the parents sought to relocate for their own employment or their spouse's employment. Another 14% tried to relocate for remarriage. Twenty-two percent sought to relocate for multiple reasons that usually included improved employment, remarriage, or further education, all justifications that generally provide long term economic benefits. Finally, another 11% looked to relocate to live with or near close relatives who could frequently offer the custodial parents economic support or in-kind assistance, such as the child care needed for employment or education. For most parents who sought relocation, economic benefits were at least one important factor in the relocation.

Reasons for requesting permission to move varied. Job-related reasons were the most common, cited by 103 litigants as the sole reason, and included as a reason by another 85 litigants. The next most common reasons for was for remarriage: 83 litigants cited remarriage as the sole reason, while another 30 included it as a reason. Other reasons that were cited frequently were to live near supportive family (67 as sole reason), and relocation for spouse's job (59 as sole reason). A much smaller number cited education (10 as sole reason) or moving to live with a non-marital partner (13 as sole reason). In 134 of the cases, the reasons were either not stated, were vague, or fell into

much smaller categories, such as starting a new life or escaping a difficult relationship with the other parent.

It was far more difficult than I imagined before starting this project to clearly identify the reasons why parents sought permission to move. In many instances, courts failed to mention the parent's reasons for requesting permission to move; in many others, they did little more than mention it in passing. Thus, one of my major findings was the extent to which the strength of parents' reasons for requesting a move, and what they may be asked to give up if permission is denied, received little attention or exploration from the courts. Attention to this issue often was only provided when it was an explicit aspect of the relocation doctrine applied by the courts in particular states, or when a court decision denied permission to relocate and focused its discussion on the best interests of the child⁷⁷

While most of this discussion highlights those cases in which there was an important reason for relocation, there were indeed cases in which no particular reason was given for the relocation, where the parent's claim was vague,⁷⁸ where the improvement seemed to be minimal,⁷⁹ or where the custodial parent sought to reduce contact with the other parent.⁸⁰ In some instances, the custodial parent sought to move to

⁷⁷ See, e.g., *Farnsworth v. Farnsworth*, 597 N.W.2d 592 (Neb. 1999)(courts must evaluate whether parent has legitimate reason for relocation; career advancement is one such reason).

⁷⁸ See, e.g., *In re Marriage of Postma*, 2003 WL 122199 (Cal. App. 1st)(mother's claim to be engaged to an unnamed person too vague).

⁷⁹ See, e.g., *Middleton v. Middleton*, 113 S.W.3d 625 (Ark. App. 2003)(mother moved to new location in order to be near some friends and take job with only minimal improved financial remuneration); *State of Nebraska on behalf of minor child Angel Janda v. Janda*, 2005 WL 3526568 (Neb. Ct. App)(father wanted to move to join his father in clock business, but could instead assume control of father's clock business in Nebraska with similar income); *Slaton v. Ray*, 2005 WL 2756076 (Tenn. Ct. App.)(salary increase of 75 cents per hour insufficient basis for relocation).

⁸⁰ See, e.g., *Gee v. Gee*, 2004 WL 1200916 (Ark. App.)(mother admitted that one important reason for her relocation eighty miles away was to eliminate interactions with her ex-husband); *Rice v. Reiland*, 2001 WL 1464185 (Cal. App. 2d)(court found that mother's stated reasons for relocation were pretextual); *In re Marriage of Green*, 2003 WL 21436800 (Cal. App. 4th)(mother sought to move from California to South Carolina to frustrate father's visitation).

start a new life and leave the broken marriage behind.⁸¹ Likewise, there were cases in which the parent's reason was so compelling that the court saw approval as obvious.⁸² In other cases, the move was precipitated by abusive conduct by the former spouse.⁸³

The discussion includes both cases in which relocation was permitted and cases in which relocation was denied. The illustrations demonstrate the types of reasons that lead parents to seek relocation. I do not argue that custodial parents are never permitted to move when it would be economically beneficial to do so. Rather, the cases described here highlight the important reasons that motivate many requests to move.

Employment

Relocation for employment was the largest single category of reasons for seeking permission to move for both men and women.⁸⁴ Men listed it as their sole reason in 47% of the cases in which they were the custodial parent seeking to relocate, while women listed it 17% of the time.⁸⁵ Requests to relocate for employment reasons were granted 45% of the time for both men and women.⁸⁶

In some cases, the relocation involved a job transfer by the same employer, or mandatory transfer by armed forces.⁸⁷ In a number of cases, the job transfer was

⁸¹ See, e.g., *Bodne v. Bodne*, 588 S.E.2d 728 (Ga. 2003)(custodial father sought to relocate to new state to establish a new medical practice “to enhance his economic opportunity and leave behind the pre-divorce chapter of his life”).

⁸² See, e.g., *In re Marriage of Abargil*, 131 Cal. Rptr.2d 429 (Cal. App. 4th 2003)(mother, who had been primary caretaker during marriage, barred from returning to U.S. from Israel because of immigration problems).

⁸³ See, e.g., 790 A.2d 1053 (Pa. Super. 2002).

⁸⁴ Men's Reasons and Women's Reasons Chart, on file with author

⁸⁵ *Id.* These percentages do not include cases in which employment was listed as one of the reasons for a requested move.

⁸⁶ Women's and Men's Reasons Charts. Requests to relocate for employment reasons were denied 39% of the time for men and 41% of the time for women, and were given no decisive ruling 14% of the time for men and 16% of the time for women. *Id.*

⁸⁷ See, e.g., *Chesser-Witmer v. Chesser*, 117 P.3d 711 (Alaska 2005)(father had one year Army transfer to NY; permitted to take child with him);

necessary for promotion within the same company.⁸⁸ One mother's request for relocation in order to accept a promotion by her employer was described as "not mandated by her employment" and a "voluntary inter office transfer" by the trial court, which denied her request to relocate with her children. When the court modified and gave primary custody to the father, the mother returned and had to appeal in order to resume custody of the children.⁸⁹

Other moves for employment were occasioned by economic uncertainty at the parent's current employer.⁹⁰ Some primary custodial parents sought permission to move because they had faced difficulties finding suitable employment in their area and had found it in another location,⁹¹ or because a different area offered a greater range of higher paying jobs.⁹² One mother, for example, sought permission to relocate because her employer, a local hospital, closed, and she was unable to obtain another position as respiratory therapist in any other hospital in the region.⁹³ Prior to obtaining a new position out-of-state, the mother's financial circumstances had become desperate and she was forced to request public financial assistance.

Other parents sought relocation in order to continue to progress in their careers.

One mother was an intelligence officer for the Air Force in Nebraska, but she had

⁸⁸ See, e.g., *Pierce v. Pierce*, 884 So.2d 855 (Ala. Civ. App. 2003), reh'g denied 2003); *In re Marriage of Wiest*, 2003 WL 576429 (Cal. App.2d); *Bottinelli v. Bottinelli*, 2003 WL 23177412 (Conn. Super.)(mother's acceptance of three year transfer to Japan by Department of Navy would lead to new opportunities for career advancement).

⁸⁹ *Pierce v. Pierce*, 884 So.2d 855 (Ala. Civ. App. 2003).

⁹⁰ See, e.g., *Cowie v. Cowie*, 2002 WL 1880369 (Conn. Super.)(father moved due to uncertainty in his Connecticut job; had proven to be financially beneficial decision).

⁹¹ See, e.g., *Hardin v. Hardin*, 618 S.E.2d 169 (mother stated she could not find employment in Atlanta area and relocated to Nashville, Tennessee; father granted change of custody).

⁹² See, e.g., *Speaker v. Speaker*, 759 N.E.2d 1174 (Ind. Ct. App. 2001).

⁹³ *Dixon v. Dixon*, 62 S.W.3d 589 (Mo. Ct. App. 2001)(mother granted permission to move for employment); see also *Casey v. Casey*, 58 P.3d 763 (Okla. 2002)(mother's employer closed local plant but offered her better paying job in different state, no other employment available to her where she lived); *B.K. v. J.K.*, 823 A.2d 987 (Pa. Super. 2003)(father had been unemployed for six months, jobs were scarce in area, relocation for new job approved).

reached the limit of her ability to advance in her career in Nebraska. She successfully petitioned to relocate to Maryland to work for the National Security Agency, which would provide her with a small salary increase to begin with, but also provide various opportunities for career advancement, with higher levels of responsibility and remuneration, than her position in Nebraska.⁹⁴ Another mother sought to relocate to a different position as a registered nurse that paid a higher salary and would assist her in obtaining a nurse anesthiologist degree.⁹⁵

Parents may work in a specialized field in which there are only employment opportunities in certain areas.⁹⁶ One example involves a woman who was a telecommunications executive in Stamford, Connecticut. After her company was taken over by an international firm, she was dissatisfied and feared that she would not be able to remain with the company. There were no other similar telecommunications jobs available in Connecticut, so the court considered her acceptance of a job offer in Vancouver, Washington to be legitimate. The job also had the potential to increase her income.⁹⁷ Another mother had run a horse farm that was not financially viable. The court did not approve her request to move to a different state where she was able to obtain related employment as a horse trainer.⁹⁸

One of the most powerful stories regarding employment involved a mother, who sought to move from Hannibal, Missouri to Fort Worth, Texas. Ms. Fohey had given up a position as a state trooper shortly before the birth of her daughter, but since the

⁹⁴ *Watson v. Watson*, 2004 WL 1724902 (Neb. Ct. App.), see also, *Potter v. Potter*, 119 P.3d 1246 (.

⁹⁵ Nevada case. See also, *Geiger v. Yeager*, 846 A.2d 691 (Pa. Super. 2004)(approving mother's petition to relocate to better nursing job that also provided assistance for additional training).

⁹⁶ See, e.g., *Billhime v. Billhime*, 869 a.2d 1031 (Pa. Super. 2005)(mother's acting career difficult to pursue in rural Pennsylvania).

⁹⁷ *Bretherton v. Bretherton*, 805 A.2d 766 (Conn. App. Ct. 2002).

dissolution of her marriage, she had only been able to obtain a low-paying position as a security guard in her geographic area. After an extensive job search, she had received an offer to work as a criminal investigator with the Federal Protective Services. Her \$28,000 salary would almost double to \$50,000 when she received her security clearance and job training for the new position, and would soon reach \$60,000, with excellent benefits. Her request to move was denied by the appellate court.⁹⁹ In another case, the mother lost the new job she had obtained during the pendency of the proceedings.¹⁰⁰

In some of the cases where courts denied petitions to relocate for job-related purposes, they “applaud[ed the mother’s] efforts to be upwardly mobile economically and her efforts at job improvement count[ed] to her advantage as a role model.”¹⁰¹ These efforts, however, were seen as in conflict with the child’s overall well-being.

Spouse’s Employment

While only one man sought to relocate for his spouse’s job,¹⁰² 115 of women sought to do so.¹⁰³ The reasons given for spousal employment relocations were very similar to those given by custodial parents who sought to relocate for their own jobs: promotion by their employers,¹⁰⁴ being laid off or at significant risk of being laid off,¹⁰⁵

⁹⁸In the Matter of Pfeuffer, 837 A.2d 311 (N. H. 2003)(mother’s petition to relocate to South Carolina denied).

⁹⁹ Fohey v. Knickerbocker, 130 S.W. 3d 730 (Mo. Ct. App. 2004).

¹⁰⁰ Ciesluk v. Ciesluk, 113 P.3d ___ (Colo. 2005).

¹⁰¹ Fields v. Fields, 749 N.E.2d 100 (Ind. Ct. App. 2001)(custody transferred to father unless mother returned to area within six months).

¹⁰² Siegfried v. Remaklus, 95 S.W.3d 107 (Mo. Ct. App. 2001)(father’s wife needed to return to California to run family business in light of her father’s death).

¹⁰³ Only one man out of 62 identified spouse’s employment as the sole reason for seeking relocation, while 11% of the cases involving women identified spouse’s employment as the sole reason for relocation. Men’s and Women’s Reasons Charts, on file with author.

¹⁰⁴ See, e.g., Boyer v. Schake, 799 A.2d 124 (Pa. Super. 2002)(new spouse had to relocate to receive promotion by employer).

or mandatory transfers conducted by the armed forces.¹⁰⁶ In other cases, the spouse's job relocation was simply stated as a fact, without any further reason being provided.¹⁰⁷

Job uncertainty or negative factors related to the job provided the motivation for some spouses to seek employment elsewhere.¹⁰⁸ For example, in *Ryland v. Hicks*, the mother's new husband was a plumber who had been working for a company that required him to be away from home for lengthy periods of time. He relocated for a job that did not require travel and paid him at a higher rate.¹⁰⁹

In some cases, the spouse's job move related to family connections in a different location. One spouse accepted a job with his aunt and uncle in building management, leading to a move from Hartford to Marietta, Georgia. The court denied permission to relocate and granted primary physical custody to the father.¹¹⁰ In other cases the move was desirable because the spouse had lost his job in the area and had needed to go further afield to find similar employment.¹¹¹ Other spouses sought to relocate to allow them to pursue their own career interests or obtain better positions with greater income and advancement possibilities.¹¹²

¹⁰⁵ See, e.g., *Fridley v. Fridley*, 748 N.e.2d 939 (Ind. Ct. App. 2001)(mother sought relocation because had been laid off from job and was unable to find similar job in area; boyfriend was also relocating to new location).

¹⁰⁶ See, e.g., *Williams v. Williams*, 2004 WL 958105 (Ark. App.)(mother sought move to join husband stationed in Georgia by Army); *Lynn v. Peppers*, 2005 WL 327683 (Ky. App.)(mother's new husband given orders for a tour of duty in Germany); *Dorman v. Dorman*, 91 S.W.3d 167(mother's second husband required to transfer to different Air Force base)

¹⁰⁷ *In re Marriage of Forest*, 2002 WL 91254 (Cal. App. 4th)(fiancé had job offer with U.S. Navy that required relocation from California to Washington, D.C.).

¹⁰⁸ See, e.g., *Romanetto v. Weirich*, 48 S.W.3d 462 (Mo. Ct. App. 2001)(following merger, mother's new husband needed to relocate in order to keep full-time employment with employer of 26 years).

¹⁰⁹ *Ryland v. Hicks*, 2004 WL 2397840 (Ark. App.).

¹¹⁰ *Foster v. Foster*, 2001 WL 1562081 (Conn. Super.). The court makes no effort to apply the factors set out in *Ireland v. Ireland*, 717 a.2d 676(Conn. 1998) See also, *Oliver v. Oliver*, 855 A.2d 1022 (wife's husband had relatives to assist him with employment).

¹¹¹ See, e.g., *Rhea v. Rhea*, 2005 WL 468189 (Conn. Super.)(fiancé had lost job, been unemployed for one year, was unable to find appropriate employment in the area).

¹¹² *Wunderlich v. Miller*, 2002 WL 31299794 (Neb. App.)(new spouse's enlistment in Army requiring move out of state insufficient basis for relocation; spouse could apply for emergency hardship discharge

In many of these cases, the woman's spouse had already accepted the new position and had already relocated in order to start working. Denial of permission to relocate left these mothers in a difficult and vulnerable position – forced to ask their husbands to relinquish their new employment opportunity and begin a new job search in the area to which the mother is confined or living in separate states for long periods of time.

Re-marriage by the Custodial Parent

Women, who generally leave marriage with fewer assets and earning ability than their husbands, have strong economic along with personal reasons for remarriage. While most women remarry after divorce, remarriage rates decline sharply for women over age 45, and women who are responsible for minor children also find it harder to remarry.¹¹³ Thus, the possibility of remarriage is one to be taken quite seriously by most women as important to many aspects of their future, an opportunity that may not easily present itself, and that may become less available as they age.

Gender differences regarding remarriage as a reason for a requested relocation were remarkable. While 15% of the women who sought to relocate for purposes of remarriage, only one custodial father requested relocation for the same purpose.¹¹⁴ Nor

and return to Nebraska); *McLaughlin v. McLaughlin*, 647 N.W.2d (Neb. 2002)(father obtained position out-of-state that paid better and provided opportunities for advancement); *Klingman v. Klingman*, 54 Pa. D. & C. 4th 28 (Pa. Com. Pl. 2001)(new husband's search for medical practice with good pay and few on-call nights insufficient reason for relocation).

¹¹³ Approximately 54% of women remarry within 5 years of divorce. Cynthia Lee Starnes, *One More Time: Alimony, Intuition and the Remarriage Termination Rule*, 81 IND. L. J. 971 (2006). Men are two-thirds more likely to remarry, and women's prospects for remarriage decrease sharply with age and with the presence of minor children from a prior marriage. Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 548-549 (1998).

¹¹⁴ Of 550 women, 82 requested relocation for purposes of remarriage. Of the 56 cases in which a decision was reached, women's request to relocate for remarriage was denied in 63% of the cases and granted in

were the courts particularly hospitable to such requests.¹¹⁵ The comment by one Pennsylvania judge seemed to characterize the response of many courts to requests to relocate for remarriage: “While relocation may enhance Mother’s own personal and emotional happiness and well-being, our concern must be centered upon whether the move is in the child’s best interests. . . . That Mother seeks such love and companionship is understandable. However, that one fact, alone, is simply not enough to require a ten-year-old child to relinquish his parental and familial supports”¹¹⁶ Other courts saw things differently. One sympathetic court described a mother’s desire to remarry and move to a different state to live with her husband as “the most normal desire in the world.”¹¹⁷ Others looked to the economic benefits of the remarriage, or the ability of the mother to stop working and spend more time with her children.¹¹⁸

The reasons why mothers sought to relocate for marriage varied. In some cases, the move is designed to allow the parent to marry someone located in a different region.¹¹⁹ A new husband or husband-to-be may have strong employment reasons for not relocating to the mother’s home. For example, one fiancé was a Naval officer who was unable to obtain a transfer from Florida to Delaware and the only other position he was offered was in South Carolina.¹²⁰ Others owned businesses that could not be

37% of the cases. Women’s Reasons Chart, on file with author. Of the 62 men with custody who requested relocation, only one sought to do so for remarriage. Men’s Reasons Chart, on file with author.

¹¹⁵ *Id.*

¹¹⁶ *Speck v. Spadafore*, 895 A.2d 606 (2006).

¹¹⁷ *Arriaga v. Gambardella*, 2002 WL 31018577 (approving mother’s petition to move from Connecticut to Texas to live with new husband).

¹¹⁸ See, e.g., 847 A.2d (Pa. Super. 2004) (permitting mother to relocate to Canada to live with husband; move would permit her to stop working and would also entail other economic benefits).

¹¹⁹ See, e.g., *Jones v. Jones*, 2003 WL 22962170 (Conn. Super.) (mother wanted to move to marry man who resided in Florida near his own children from a prior marriage; court does not give any weight to his maintenance of a relationship with them); *Mitchell v. Mitchell*, 2005 WL 1521850 (Tenn. Ct. App.) (relocation for remarriage denied where no explanation given why new husband could not relocate).

¹²⁰ *Loman v. Dobbins*, 878 A.2d 461 (Del. Super. 2005) (permission to move denied because not considered in child’s best interests to be removed from father and extended family in Delaware).

transplanted.¹²¹ New spouses may have their own children from a prior marriage or relationship and wish to remain in the same area as those children.¹²² Parents may face lengthy periods of separation from new spouses due to relocation disputes.¹²³ In other cases, the new spouse's location is simply stated as a fact, without analysis as to why he or she is not relocating upon marriage.¹²⁴

Remarriage can have strong positive economic impacts on women. While some courts were receptive to requests to move to live with new spouses, others carefully scrutinized such requests to determine if it was possible for the new spouse to relocate to the parent's current location.¹²⁵ In some cases, these impacts are denigrated by the courts or viewed in the short term. Nor did many courts recognize that women who wanted to remarry may have less leverage to get a new spouse to relocate for them, and that their inability to relocate might terminate an otherwise promising relationship.

Family

¹²¹ See, e.g., *Dranko v. Dranko*, 824 A.2d 1215 (Pa. Super. 2003)(fiancé self-employed as cabinetmaker and installer).

¹²² See, e.g., *Blivin v. Weber*, 126 S.W.3d 351 (Ark. 2003)(mother married man who lived in North Carolina and had three children from a prior marriage living in that area) *Wild v. Wild*, 696 N.W.2d 886 (Neb. Ct. App. 2005)(mother's fiancé had a child from prior marriage where he lived, permission to relocate denied because mother did not demonstrate economic improvement from move).

¹²³ See, e.g., *Walrack v. Edge*, 190 S.W.2d 281 (Ark. App. 2004)(mother sought permission to move in March, 2002 until September, 2004, when her appeal was granted; during that time she lived separate from her new husband, visiting only on weekends).

¹²⁴ *Lawson v. Langford*, 2005 WL 735861 (Ky. App.)(simply stating that "new husband's employment was in Verona," although facts also show that mother had been a stay-at-home mother who had not been employed during the prior marriage).

¹²⁵ Compare *Vander Vennett v. Vander Vennett*, 2003 WL 21958388 (Conn. Super.)(mother allowed to relocate to Vermont to live with new husband there without any analysis of new husband's ability to find employment where she currently lived) to *Jones v. Jones*, 2003 WL 22962170 (Conn. Super.)(court carefully scrutinized all aspects of move, including fiancé's reasons for not relocating to Connecticut before denying permission to relocate).

Family exerted a great pull on parents who sought to relocate.¹²⁶ While the return to family could be based on dire economic circumstances,¹²⁷ in other cases, the move to be close to family seemed related to the general emotional and financial support they would provide to a parent who worked full-time and had primary responsibility for children.¹²⁸ As the dissent noted in *Sill v. Sill*, “I do not understand what is not to believe about the preference of a divorced woman with two young children to live near her family.”¹²⁹ In many cases, the desire and benefits of relocating to be near family received little exploration.¹³⁰

Family offered a wide range of types of support. Some parents were economically and emotionally dependent on family members who are choosing themselves to move, forcing the parent to move if she wishes to continue to receive their support.¹³¹ Family may also be called upon to help a parent through a rough time, or simply to provide a supportive network in a new location that is otherwise viewed favorably by the parent.¹³² The need for emotional support may have been especially

¹²⁶ Family was identified as the sole reason for seeking relocation by 67 of the 612 parents (11%). State Relocation Chart, on file with author.

¹²⁷ See, e.g., *Lucas v. Lucas*, 882 A.2d 523 (Pa. Super. 2005)(father’s abandonment and refusal to provide any financial support had left mother and two children without marital home or any other means of support); *Collins v. Collins*, 897 A. 2d 466 (Pa. Super. 2006)(family’s financial troubles led mother to seek relocation to live with parents).

¹²⁸ *Sill v. Sill*, ___ S.W. 3d ___ (Ark App. 2006)(mother returned to family home; petition opposing relocation was granted and mother forced to return); *In re Marriage of Bryant*, 110 Cal. Rptr.2d 791 (Cal. App. 4th 2001); *Price v. Bright*, 2005 WL 166955 (Tenn. Ct. App.)(father sought to relocate to have child care assistance from family while worked).

¹²⁹ *Id.* at ___. In other cases, the desire to live near family pre-dated the dissolution of the marriage. See, e.g., *Bojrab v. Bojrab*, 810 N.E.2d 1008 (Ind. 2004).

¹³⁰ *Green v. Green*, 843 N.E.2d 23 (Ind. Ct. App. 2006)(mother’s desire to live with or near her family given little weight; presence of father’s family in current location and their involvement with child given great weight in court’s analysis); *Marriage of Austin*, 86 P.3d 1026 (Kan. Ct. App. 2004)(court merely notes mother’s “circumstances and her desire to move . . . to be closer to her family and a support structure for the children”).

¹³¹ *Durazzo v. Tomson*, 2005 WL 3471478 (Conn. Super.)(mother sought to join sister and mother in relocation from Connecticut to West Virginia).

¹³² See, e.g., *Sabo v. Sabo*, 2002 WL 1902997 (Conn. Super.)(mother in difficult financial situation sought to move to Florida to live near supportive family and for lower cost of living expenses).

great for women who had relocated to the United States from other countries, and who wished to return to a familiar cultural, social and family landscape.¹³³

Family may also make education possible by providing housing and child care assistance while a parent educates themselves for employment or works.¹³⁴ Family may be in a position to offer job opportunities a parent does not have available to them where they currently reside. One mother sought to relocate in order to join her sister's business, which would almost double her salary, allow her to buy a home instead of living in a trailer, and the potential for acquiring future equity in the business.¹³⁵

Not all moves were requested to obtain assistance for the requesting parent. In some cases, the desire to move to be closer to family arose from the caretaking needs of an ailing parent.¹³⁶ These cases highlight the multiple caretaking responsibilities faced by many women.

Education

Education alone was not a frequently cited reason for requesting relocation.¹³⁷ In some cases, parents requested permission to relocate with the child in order to attend

¹³³ See, e.g., *Goldfarb v. Goldfarb*, 861 A.2d 340 (Pa. Super. 2004)(mother sought to return to family in Israel; mother was also unable to work as trained nurse in U.S. because of her limited English skills).

¹³⁴ *In re Marriage of Bianco*, 2004 WL 1303620 (Cal. App. 2 Dist.)(mother had lost job and wanted to relocate to Georgia where her parents would provide her with a rent free place to live so she could go back to school to become an elementary school teacher); *Voycheske v. Baum*, 2005 WL 283537 (Neb. App.)(mother sought to relocate to earn elementary education teachers degree and parents could provide child care while she attended school and also provide financial assistance)..

¹³⁵ *Reel v. Harrison*, 60 P.3d 480 (Nev. 2002)(mother permitted to relocate where employment greatly improved, and living and schooling circumstances of child, along with greater proximity to relatives, available to child in new location).

¹³⁶ See, e.g., *Weickert v. Weickert*, 602 S.E.2d 337 (Ga. Ct. App. 2004).

¹³⁷ Education was listed as the sole reason in only 10 of the 612 cases. It was listed as one of the reasons in another 28 cases. State Relocation Chart, on file with author.

college, obtain a graduate degree, or to enter a specialized educational program.¹³⁸ Such moves were not always viewed favorably by courts.¹³⁹

Analyzing the Effects of Relocation Doctrine on Custodial Parents

The cases highlight the uncertain nature of a custodial parent's ability to relocate for personal or economic gain. The cases that reach an appellate decision are most likely only a small percentage of custodial parents who want to relocate but who are unable to effectuate their choice through the courts. Custodial parents who want to relocate to take advantage of favorable employment, remarriage or other opportunities face numerous barriers to attaining their goal. Many of these barriers receive little or no attention by the courts, but they may serve to reduce the number of custodial parents who are able to make financially beneficial moves. For example, employers may be reluctant to even make an offer of employment to a parent who is not at liberty to relocate without the consent of their children's other parent or the court. Even where an offer is received, employers may be unwilling to hold it open for long enough to allow the parent to provide the statutory period of notice, often sixty days, or the even longer and uncertain period of time required for litigation. The expense custodial parents must assume in order to litigate their right to relocate may also prevent parents from seeking judicial permission to relocate.

I have argued that contemporary family law reflects two very different approaches: the clean break approach to economic issues, and the co-parenting approach

¹³⁸ See, e.g., *Potter v. Branson*, 877 A.2d 52 (mother denied permission to relocate with son to Newark from Dagsboro, Delaware to attend the University of Delaware); *Shafer v. Shafer*, 898 So.2d 1053 (Fla. Ct. App. 4th Dist. 2005)(mother's move to law school necessary because no closer law school available); *Germer v. Germer*, 2005 WL 1216770(Neb. Ct. App.)(mother wanted to move to different state for medical technology program because local program did not have master's program available).

¹³⁹ See, e.g., *Ex part Roberts*, 796 So.2d 349 (Ala. 2001)(mother's move of herself and daughter for college not in child's best interests; custody modified and given to father).

to child custody issues. The clean break theory is advocated as a method of achieving autonomy for each of the parties after divorce, allowing them to start new lives. The co-parenting approach to custody law is supported as beneficial to children, enabling them to maintain strong ties with both parents post-dissolution. I have reviewed relocation cases as a way to explore the links between these two theories.

Many of the relocation cases reviewed reflect the interdependence model for post-dissolution parenting. Under the relocation doctrine developed by a number of states, the primary focus of analysis is the best interests of the child, with great attention paid to the child's relationship to the non-relocating parent. Given that 90% of those parents seeking to relocate with their children were mothers, this meant that courts focused on maintaining the relationship between children and their fathers. This focus echoes a similar focus in the social science literature.

In many cases, however, little attention was paid to the extent to which the interdependence, or co-parenting, model undermined the ability of the custodial mother to achieve the clean break envisioned by our approach to divorce law. Economic consequences of relocation for the custodial parents were often of little or no importance to judicial decision-making. In many states, those economic benefits mattered only if they would directly benefit the child who was the focus of the court's concern.

In accordance with the clean break model, however, none of the courts granted any financial remedy to a parent whose petition to relocate was denied. The possibility of such a remedy was not even discussed, even where a court acknowledged the heavy financial loss facing the custodial parent. Instead, the decision is characterized as one solely focused on the child's best interest. As one court noted,

There is no doubt that the relocation was in the mother's best interest. What is unsubstantiated, based on the evidence presented, is whether the relocation is in the [daughter's] best interest. . . . By our decision today, we in no way impugn the mother's laudable efforts to improve her lot in life. The focus of our inquiry is simply the sufficiency of the evidence that the relocation is in [the daughter's] best interest.¹⁴⁰

Because the economic consequences of foregoing relocation were without remedy, they tended to be rendered invisible. Some courts reiterated the belief that this significant restriction on the freedom of mothers to relocate in accord with their own personal and economic interests was simply the sacrifice expected of parents for their children. This sacrifice was not, however, required of the non-relocating non-custodial parent. Only in a few instances did a court even consider the possibility that the non-custodial parent could relocate at the same time in order to remain in close proximity to the child. The non-custodial parent's right to remain in the current geographic location was simply assumed.

Given that almost all parents who sought relocation were mothers, it is necessary to consider the deeply gendered nature of these disputes and their consequences. Feminist scholars have pointed out the tendency by courts to take mother's caregiving for granted while they view father's caretaking as valuable and in need of nurturance.¹⁴¹ The inclination courts have to view restrictions on relocation as merely part of the sacrifices of parenthood may underestimate the extent to which these sacrifices are not evenly shared but fall most heavily on mothers. Even if courts are given the ability to craft a

¹⁴⁰ Fohey v. Knickerbocker, 130 S.W.3d 730, 740 (Mo. Ct. App. 2004). In this case, because the trial court had initially permitted the relocation, the effect of the appellate court's decision was to require the mother to leave her new job in Texas and return to Missouri. The court makes no comment about whether her last job is still available to her upon her return.

remedy for sharing the economic consequences of denying relocation, they may be reluctant to impose them if these consequences are viewed as the natural sacrifices of motherhood rather than shared costs of co-parenting.

This concern becomes more real when viewed in light of courts' approaches to granting relocation. While the costs of denying relocation were invisible, the financial concerns of the non-relocating parent were often given attention when the custodial parent did receive permission to relocate. In many cases, relocating parents either offered to bear or share the additional transportation or other costs associated with the move in order to aid their case for relocation. In other cases, relocating parents were ordered to pay all or some of these costs. If the additional costs of relocation can be shared or placed on the relocating custodial, why can not the economic consequences of a denial of relocation also be shared?

What are the Concerns with Remedying the Economic Consequences of Relocation Denials?

As with all matters involving the post-dissolution family, there are no simple answers to any dilemma. Parents who have chosen to separate or divorce may have few overlapping interests. Often, they would prefer to be unencumbered by the other, and the demands of co-parenting may create an undesirable level of interaction. Thus, a call to consider adding new economic links must be viewed with caution. What complications can arise from such a shift?

¹⁴¹ Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, U.C.L.A. L. Rev. 38 (1991).

First, increasing rather than decreasing the economic links between co-parents may serve to heighten already strained relationships. Those parents who already view each other's actions with deep suspicion may regard the consideration of an economic remedy as yet another effort by the co-parent to gain some unearned advantage. Yet, non-custodial parents' efforts to prevent relocation are often already viewed negatively by the parent who seeks to relocate, so suspicions of strategic behavior may already be there. We cannot ignore, of course, the possibility that a parent will seek relocation purely as a strategic measure to gain an economic advantage, but courts must already determine whether a parent's stated motives are a pretext for undermining the child's relationship with the other parent, so issues of motive are often already before the court.

Attending to the economic consequences of relocation denials affects the interests of the non-custodial parent to be autonomous in financial matters. Such autonomy is one of the foundations of the clean break model, but diminishes where the non-custodial parent's efforts to keep their children close at hand conflicts with the economic autonomy of the custodial parent.

Some may argue that the economic autonomy of non-custodial parents is already encumbered through the child support system. A non-custodial parent's child support obligation is unlikely to be lowered for the parent to take a lower paying job or quit working in order to obtain further education. While this may create a financial impediment to making the desired change, no court order will issue requiring the obligor to maintain a certain job or pass up educational opportunities. All that will be required is that the child support obligation be fulfilled. In addition, under the income share approach used in most jurisdictions, neither parent may reduce their income without having the lost income be imputed to them as available for the needs of their children.

This does not, of course, explain why the non-custodial parent should be responsible for sharing the costs of missed economic opportunities designed to keep his children close geographically. If each parent has an independent obligation to make decisions in the children's best interests, then the non-custodial parent is not responsible for the effects of court decisions that enforce that fiduciary obligation. This ignores the essence of the co-parenting model: that both parents are responsible for the child's care, and that co-parenting means that those responsibilities are shared. Non-custodial parents are not prevented from relocating in order to improve their economic lot, and courts are expected to adapt the custodial arrangements to accommodate the relocation. Non-custodial parents' arguments favor receiving the benefits of both models – freedom to make a clean break economically along with an entitlement to claim the benefits of the co-parenting approach.

Now, however, many non-custodial parents do not use their relative freedom to move away from their children, and instead embrace the demands of parenthood. While some non-custodial parents simply resist relocation, others offer to assume primary custody of the child, an outcome that many custodial parents strongly resist. Their willingness to allow the custodial parent to relocate without the child and to assume the greater burdens of childrearing should, they might argue, obviate any need to provide an economic remedy to a parent who continues to assert that they want to move with the children. In fact, the research shows that some state courts readily reallocate custody when custodial parents seek relocation. In most states, however, such modifications may only be made where it is in the child's best interests to do so. The mere willingness to be the primary custodian, without more, should not prevent the possibility of an economic remedy where a court determines that such a reallocation is not in the child's best

interests. At the same time, a number of primary custodial parents have come to realize that where parenting time is equally or almost equally shared, they cannot assume that relocation with their children is automatically in their children's best interests, and that they may have to be the long distance parent if they are committed to relocating.

Families in which the co-parenting model is most fully in effect may also be the families in which relocation by either parent with the children is most difficult.

Another concern with the addition of an economic remedy is that it ignores the financial realities of many families post-dissolution. Few non-custodial parents may have many resources to share, so this may be a remedy available only to upper middle class and high income families. This issue highlights one of great concern in all facets of private family law, including property distribution, alimony and child support. Private family law restricts resources to those already available within the family, which means that those in lower income families get less. It does not reduce the need to consider such remedies when the financial resources are available.

This issue, however, raises a much deeper issue that cannot be addressed by consideration of economic remedies for parents denied permission to relocate. This far deeper issue concerns the lack of economic support for parenting more broadly. In our society, autonomy and independence are viewed as the norm, market labor of great value, while caretaking is often viewed as a gift for which no remuneration is required. Most U.S. families with children struggle to make ends meet while they meet the demands of caregiving for their children; families that have broken apart face even greater challenges achieving economic security. Most vulnerable are families that are composed primarily of women and children.

Courts have described relocation disputes as some of the most painful decisions they face. Considering the possibility of economic remedies when permission to relocate is being denied does little to change this . This Article argues, however, that the choices available to courts considering relocation disputes have been too limited, and that at the very least, when they enforce the co-parenting model through relocation restrictions, they should consider employing a similar model of interdependence for the economic consequences of those decisions.

Looking Forward

Little empirical work has been done on the lives of families, and in particular, the lives of parents, post-dissolution. Family law doctrine often reflects deeply held ideological beliefs or political pressures rather than reasoned analysis based on the lives of real families. Such research is urgently needed to identify what policies may enable all members of the post-dissolution family to thrive under what are often difficult circumstances. While the cases reviewed here highlight some of the tensions and pressures faced by parents a more accurate and complete picture is needed.

Conclusion

The motivations for relocation vary dramatically, from the vindictive to the essential. Courts already must make their way through detailed and often conflicting evidence about motive and the effects of the move on the child in question. In a significant number of the cases reviewed, however, the facts available in the reported opinions indicate that the reasons for a parent's request to relocate would have a strong economic impact on the parent seeking relocation. Those parents were most often women. Given the links between divorce and financial difficulties faced by divorced or

never married mothers raising their children, these cases highlight the need to consider the economic impact of the post-dissolution co-parenting relationship.

Surely, economic concerns are not the only ones raised by the relocation cases. Relocations to live with a new spouse or near close relatives may have positive economic effects, but they are often primarily about reshaping one's life as one full of loving, supportive people following the difficulties of divorce or relationship dissolution, or of having support to provide good parenting to one's children under difficult circumstances. Acknowledging and addressing the economic impact of judicial decisions to prevent relocation will not address these far deeper concerns. This does not mean, however, that economic concerns should be disregarded.

Property and alimony decisions made at the time of dissolution cannot reflect the changes that may occur throughout the rest of the minority of a couple's children. Those with primary responsibility for caring for children post-dissolution may face important limitations on their earning capacity from those caretaking responsibilities. Those limitations, however, for some custodial parents, may derive largely from their obligations to support the co-parenting of the child by the other parent. This paper has not examined whether these restrictions, which impose extensive limitations on the ability of custodial parents to make important decisions about their lives, are justified. It urges instead that if we are to impose or encourage such limits, that parents who do experience such limits be permitted to raise the economic costs of those restrictions, to ensure that those economic costs are not being born alone by those who are already making other significant sacrifices to provide substantial care to their children.