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THE NECESSITY OF "RIGHT TO TRAVEL" ANALYSIS IN CUSTODIAL PARENT RELOCATION CASES

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INTRODUCTION

The most complex issue facing judges today during post divorce modifications is proposed relocations by the custodial parent. "As our society has become increasingly mobile and migratory, the number of relocation cases has continued to expand at an astounding rate."[1] Throughout America, courts facing this issue have not found any uniform response to this relocation quagmire. Some states place the burden on the non-custodial parent to demonstrate why such a relocation is against the best-interest of the child.[2] Other states place the burden of

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[1] *See In re* Marriage of Burgress, 913 P.2d 473, 480 (Cal. 1996); David M. Cotter, *Oh, the Places You'll (Possibly) Go! Recent Case Law in Relocation of the Custodial Parent*, 16 DIVORCE LITIG. 152, 152 (2004).

[2] *See* CAL. FAM. CODE § 7501 (West 2009); TENN. CODE ANN. § 36-6-108(d) (2007); W. VA. CODE § 48-9-403(d)(1) (2001); WIS. STAT. ANN. § 767.481 (West 2009); Chesser-Witmer v. Chesser, 117 P.3d 711, 717 (Alaska 2005); Hollandsworth v. Knyzewski, 109 S.W.3d 653, 662–63 (Ark. 2003); Tarlan v. Sorensen, 702 N.W.2d 915, 921 (Minn. Ct. App. 2005); *In re* Marriage of Robinson, 53 P.3d 1279, 1282–83 (Mont. 2002); Flynn v. Flynn, 92 P.3d 1224, 1228 (Nev. 2004); Evans v. Evans, 530 S.E.2d 576, 578–79 (N.C. Ct. App. 2000); Berens v. Berens, 689 N.W.2d 207, 212 (S.D. 2004); Bates v. Texar, 81 S.W.3d 411, 421–22 (Tex. Ct. App. 2002); Hudema v. Carpenter, 989 P.2d 491, 498 (Utah Ct. App. 1999); *In re* Marriage of Horner, 93 P.3d 124, 130 (Wash. 2004); Harshberger v. Harshberger, 117 P.3d 1244, 1252 (Wyo. 2005).

proof on the custodial parent to prove the relocation is in the child's best interest.[3] Furthermore, several states do not shift a burden to either parent.[4] Additionally, a few of these state courts have created qualified standards, where the custodial parent must prove a legitimate reason for the relocation before the best interest standards are even entertained by the court.[5] To confuse matters even more, jurisdictions have restricted these varying relocation standards to apply only when certain conditions are met, such as when the custodial parent relocates out-of-state, relocates beyond a given distance from the residence of the non-relocating parent, or only lives a certain distance away from the non-custodial parent.[6]

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[3] ALA. CODE § 30-3-169.4 (2003); ARIZ. REV. STAT. ANN. § 25-408(G) (2008); DEL. CODE ANN. tit. 13, § 729(c) (2008); 750 ILL. COMP. STAT. 5/609 (2008); LA. REV. STAT. ANN. § 9:355.13 (2009); Roberts v. Roberts, 64 P.3d 327, 331 (Idaho 2003); *In re* Marriage of Thielges, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000); Fowler v. Sowers, 151 S.W.3d 357, 359 (Ky. Ct. App. 2004); Kinter v. Nichols, 722 A.2d 1274, 1276 (Me. 1999); Grew v. Knox, 694 N.W.2d 772, 774 (Mich. Ct. App. 2005); Baures v. Lewis, 770 A.2d 214, 233 (N.J. 2001); Paul v. Pagnillo, 786 N.Y.S.2d 662, 664 (N.Y. App. Div. 2004); Maynard v. McNett, 710 N.W.2d 369, 373 (N.D. 2006); *In re* Marriage of Colson, 51 P.3d 607, 612 (Or. Ct. App. 2002); Gruber v. Gruber, 583 A.2d 434, 440 (Pa. Super. Ct. 1990); Surles v. Mayer, 628 S.E.2d 563, 576 (Va. Ct. App. 2006).

[4] FLA. STAT. § 61.13001 (2008); *In re* Marriage of Ciesluk, 113 P.3d 135, 146–47 (Colo. 2005); Bodne v. Bodne, 588 S.E.2d 728, 730 (Ga. Ct. App. 2003); *In re* Marriage of Bradley, 899 P.2d 471, 473 (Kan. 1995); Braun v. Braun, 750 A.2d 624, 636 (Md. Ct. App. 2000); Jaramillo v. Jaramillo, 823 P.2d 299, 307–10 (N.M. 1991); Dupre v. Dupre, 857 A.2d 242, 254 (R.I. 2004); Latimer v. Farmer, 602 S.E.2d 32, 34–35 (S.C. 2004).

[5] IND. CODE § 31-17-2.2-5 (2008); MO. REV. STAT. § 452.377 (2003); N.H. REV. STAT. ANN. § 461-A:12 (2005); Ireland v. Ireland, 717 A.2d 676, 682 (Conn. 1998); Rosenthal v. Maney, 745 N.E.2d 350, 358–59 (Mass. Ct. App. 2001); McLaughlin v. McLaughlin, 647 N.W.2d 577, 581 (Neb. 2002).

[6] *See* ALA. CODE § 30-3-169.4 (2003) (providing a standard that applies to any out-of-state moves or moves that are more than 60 miles from the non-custodial parent in-state); ARIZ. REV. STAT. ANN. § 25-408(B) (2008) (providing a standard that applies to any out-of-state moves or moves that are more than 100 miles from the non-custodial parent in-state); IOWA CODE § 598.21D (2009) (providing that it can be considered a material change of circumstance to modify custody if the custodial parent relocates more than 150 miles away from the child's residence when custody was originally awarded); LA. REV. STAT. ANN. § 9:355.1(4) (2009) (providing that relocation tests only apply if the custodial parent is moving out of state or if moving 150 miles away from the child's residence in-state); ME. REV. STAT. ANN. tit.19-A, § 1657(2) (2009) (providing a standard that only applies if the custodial parent moves out-of-state or more than sixty miles from either parent's residence in-state); MICH. COMP. LAWS ANN. § 722.31(1) (West 2009) (providing that the relocation standard does not apply (1) if the custodial parent does not move more than 100 miles away from the child's residence at the time of the original custody order or (2) if the parents' homes are more than 100 miles apart at the time of the move); N.D. CENT. CODE § 14-09-07 (2009) (providing that relocation is permitted if the non-relocating parent has moved out-of-state or more than fifty miles from the other parent's residence); TENN. CODE ANN. § 36-6-108(a) (2007) (providing that the relocation standard only applies when the custodial parent moves out-of-state or 100 miles from the non-relocating parent in-state); UTAH CODE ANN. § 30-3-37(1) (2008) (providing that the relocation standard applies if the custodial parent relocates out-of-state or 150 miles from the child's residence in-state); WIS. STAT. ANN. § 767.327(1)(a)(2) (West 2009) (providing that the relocation standard applies if the custodial parent relocates out-of-state or 150 miles from non-relocating parent); *In re* Marriage of Seitzinger, 775 N.E.2d 282, 288 (Ill. Ct. App. 2002) ("It is not necessary

With these differing standards and burdens of proof governing custodial parent relocations, exactly whose interests are these courts ultimately trying to protect? Are these courts protecting the state's interest in maintaining contact with the child? Are they protecting the autonomy of the custodial parent or the non-custodial parent's relationship with the child? Or, maybe these courts are purely protecting the best interest of the child? Regardless of the articulated protected interest, the underlying policy behind the relevant standard for custodial parent relocation must be analyzed because a rigid application of these relocation standards can allow for absurd results. Conversely, if courts continue to produce a hodgepodge of relocation decisions, the predictability and stability that lawyers and litigants should expect from recent decisions is absent, resulting in more relocation litigation.[7] The recent Nebraska Court of Appeals decision *Curtis v. Curtis* is the quintessential example of an appellate court's rigid application of a state's common law relocation standards, thereby producing absurd results.[8] In *Curtis*, the Nebraska Court of Appeals overturned the trial court's order, allowing a custodial mother's relocation of 17.6 miles from the non-custodial parent.[9] The basis of the Nebraska Court of Appeals's decision was the finding that the mother's desire to relocate to live with her boyfriend was not one of the pre-determined "legitimate reasons" that a custodial parent is allowed to relocate out of the State of Nebraska.[10] However, after the mother's relocation in *Curtis*, the father's visitation remained the same and the mother's standard of living improved.[11] Thus, the

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for a custodial parent or a parent with primary physical custody to obtain permission from a court before moving to another location in Illinois."); *McLaughlin*, 647 N.W.2d at 591–92 (Stephen, J., dissenting) (stating that a custodial parent does not need to seek permission to relocate within the state).

[7] *See* Katherine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 471–72 (1999); Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 41 (1996) (citing DeBeaumont v. Goodrich, 644 A.2d 843, 857–58 (Vt. 1994) (Johnson, J., dissenting)).

[8] 759 N.W.2d 269 (Neb. Ct. App. 2008).

[9] *Id.* at 273.

[10] *Id.* ("Clearly, [the mother's] desire to move from Nebraska is not based on an employment opportunity for her . . . and is not based on remarriage. [The mother's] sole reason for wanting to move is her desire to continue living with [her boyfriend] as she has been doing since moving out of the marital home. Because [the boyfriend] is selling his house in Fall City where [the mother and child] have been living, [the mother and child] have to find someplace else to live. However, [the mother] has not demonstrated a legitimate reason as to why their new home has to be with [her boyfriend] in Missouri.").

[11] *Id.* Testimony revealed the father's visitation would remain the same after the mother's relocation to Missouri and that the boyfriend's new home in Missouri would provide "newer and more spacious housing" for the mother and child than the mother would be able to afford on her own. *Id.* It is also worth noting that the reason the mother could not obtain housing on her own was because her credit was ruined when the father allowed the marital home to be foreclosed on, which he was awarded in the divorce and ordered to hold the mother harmless against the mortgage. *Id.* at 272.

only logical conclusion is that the Nebraska Court of Appeals has made a judicial determination that the State of Nebraska has a policy of maintaining its children within the jurisdiction.[12] However, such a policy ignores the custodial parent's constitutional right to travel.

This article will discuss the underlying policies behind relocations standards in various jurisdictions, such as those articulated in *Curtis*.[13] This article will also analyze a custodial parent's constitutional right to travel, and review how balancing the custodial parent's right to travel with other competing interests would avoid some unnecessary relocation litigation.[14]

I. CUSTODIAL PARENT'S CONSTITUTIONAL RIGHT TO TRAVEL

A custodial parent's constitutional right to interstate and intrastate travel is rarely analyzed by courts in relocation cases.[15] The current paradigm is finding courts and legislatures moving away from presumptions and rights based analysis, and toward an emphasis on the elusive "child's best interest" standard.[16] However, as analysis of *Curtis* will demonstrate, a failure by courts to recognize and analyze a parent's constitutional right to travel will, at times, yield absurd results.

Although state courts often fail to acknowledge an individual's right to travel when deciding whether to approve a custodial parent's relocation, the right to travel has been unequivocally recognized by the United States Supreme Court.[17]

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[12] Since in *Curtis* the child was not harmed and the father's visitation schedule was not altered by the mother's relocation to Missouri, the only logical conclusion can be that the State of Nebraska has a policy of keeping its children within its borders. *See, e.g.*, Vanderzee v. Vanderzee, 380 N.W.2d 310, 311 (Neb. 1986) ("Generally, the best policy in divorce cases is to keep minor children within the jurisdiction . . . .").

[13] *See infra* notes 160–67 and accompanying text.

[14] *See* discussion *infra* Parts I, II, and III.

[15] *See* Lance Cagle, *Have Kids, Might Travel: The Need for a New Roadmap in Illinois Relocation Cases*, 25 N. ILL. U. L. REV. 255, 259–60 (2005); Arthur B. LaFrance, *supra* note 7, at 3; Tabitha Sample & Teresa Reiger, *Relocation Standards and Constitutional Considerations*, 10 J. AM. ACAD. MATRIM. LAW. 229, 237 (1998); Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 613 (2001).

[16] *See* Storrow, *supra* note 15, at 637.

[17] *See* Saenz v. Roe, 526 U.S. 489, 498 (1999) ("The word 'travel' is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence.") (quoting United States v. Guest, 383 U.S. 745, 757 (1966)); Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974) ("The right of interstate travel has repeatedly been recognized as a basic constitutional freedom."); Shapiro v. Thompson, 394 U.S. 618, 629 (1969), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651, 671 (1974) ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this

In *Saenz v. Roe*, the United States Supreme Court declared that an individual's right to interstate travel is guaranteed by the Privileges and Immunities Clause of the Fourteenth Amendment of the United States Constitution.[18] Justice John Paul Stevens, in his majority opinion, stated:

> The word "travel" is not found in the text of the Constitution. Yet the "constitutional right to travel from one State to another" is firmly embedded in our jurisprudence. Indeed, as Justice Stewart reminded us . . . the right is so important that it is "assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all."[19]

The United States Supreme Court has further stated that the right to travel encompasses the right to "migrate, resettle, find a new job, and start a new life."[20] Furthermore, the United States Supreme Court has clearly stated that a person's right to interstate travel cannot be impinged on absent a compelling state interest.[21]

Appellate courts in at least thirty different states have, at a minimum, discussed a custodial parent's constitutional right to interstate travel in the context of a custodial parent's relocation.[22] Of these appellate courts, courts in Wyoming and

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movement."). For a complete a review of the constitutional right to travel, see Nicole I. Hyland, *On the Road Again: How Much Mileage is Left on the Privileges or Immunities Clauses and How Far Will it Travel?*, 70 FORDHAM L. REV. 187 (2001); *see also* Gregory B. Hartch, *Wrong Turns: A Critique of the Supreme Court's Right to Travel Cases*, 21 WM. MITCHELL L. REV. 457, 458 (1995) ("[N]o Supreme Court justice in American history has voiced opposition to the general concept of a right to travel.").

[18] 526 U.S. at 502.

[19] *Id.* at 498 (citations omitted).

[20] *Shapiro*, 394 U.S. at 629.

[21] *Mem'l Hosp.*, 415 U.S. at 253.

[22] *See* Everett v. Everett, 660 So.2d 599, 601 (Ala. Civ. App. 1995); Pollock v. Pollock, 889 P.2d 633, 635 (Ariz. Ct. App. 1995); *In re* Marriage of Fingert, 221 Cal. App. 3d 1575, 1582 (1990); *In re* Marriage of Ciesluk, 113 P.3d 135, 138 (Colo. 2005); Azia v. DiLascia, 780 A.2d 992, 995 (Conn. App. Ct. 2001); Fredman v. Fredman, 960 So.2d 52, 53 (Fla. 2d Dist. Ct. App. 2007); Tetreault v. Tetreault, 55 P.3d 845, 851 (Haw. Ct. App. 2002); Bartosz v. Jones, 197 P.3d 310, 314 (Idaho 2008); *In re* Marriage of Manuele, 438 N.E.2d 691, 764 (Ill. Ct. App. 1982); Baxendale v. Raich, 878 N.E.2d 1252, 1254 (Ind. 2008); Wohlert v. Toal, No. 02-1981, slip op. (Iowa. Ct. App. Aug. 27, 2003); Carlson v. Carlson, 661 P.2d 833, 834 (Kan. Ct. App. 1983); Burch v. Burch, 814 So.2d 755, 759 (La. Ct. App. 2002); Braun v. Headey, 750 A.2d 624, 628–29 (Md. Ct. Spec. App. 2000); Mason v. Coleman, 850 N.E.2d 513, 515 (Mass. 2006); Beaton v. Beaton, No. 202753, 1998 WL 1993003, at *4 (Mich. Ct. App. Feb. 3, 1998); LaChapelle v. Mitten, 607 N.W.2d 151, 156 (Minn. Ct. App. 2001); *In re* Marriage of Cole, 729 P.2d 1276, 1280 (Mont. 1986); Reel v. Harrison, 60 P.3d 480, 482 (Nev. 2002); Murnane v. Murnane, 552 A.2d 194, 198 (N.J. Super. Ct. App. Div. 1989); Jaramillo v. Jaramillo, 823 P.2d 299, 302–03 (N.M. 1991); McRae v. Carbno, 404 N.W.2d 508, 509 (N.D. 1987); Rozborski v. Rozborski, 686 N.E.2d. 546, 548 (Ohio Ct. App. 1996); Clapper v. Clapper, 578 A.2d 17, 19 (Pa. Super. Ct. 1990); Africano v. Castelli, 837 A.2d

California have specifically recognized a parent's constitutional right to interstate travel includes the constitutional right to intrastate travel as well.[23] Furthermore, most of the courts that have discussed a parent's constitutional right to travel, have recognized that an individual's right to travel, as a fundamental right, can only be restricted in furtherance of a compelling state interest.[24]

Most of the courts addressing a custodial parent's right to travel have acknowledged that this right is implicated when a custodial parent attempts to relocate with the child.[25] However, courts have not agreed on how to balance the right to travel with the rights of the non-custodial parent in the context of the best interest of the child analysis.[26] There appear to be five classifications developed by courts when addressing the right to travel in the framework of custodial parent relocation: (1) the right to travel is absolute; (2) creation of a pure balancing test of the right to travel with other compelling state interests; (3) finding the best interest of the child is a compelling state interest which does not require balancing the parent's right to travel; (4) finding the non-custodial parent's right to visitation is a compelling state interest which does not require a balancing of the right to travel; and (5) finding the parent's right to travel is not implicated in the context of custodial parent relocations.

A. Right to Travel is Absolute

The Wyoming Supreme Court's interpretation of a custodial parent's right to travel elevates the relocating parent's right to travel over other competing interests.[27] In *Watt v. Watt*, the custodial mother desired to move from Upton, Wyoming to Laramie, Wyoming to attend a pharmacy program at the University of Wyoming, a distance of approximately 270 miles.[28] In a modification action,

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721, 724 (R.I. 2003); *In re* C.R.O., 96 S.W.3d 442, 445 (Tex. Ct. App. 2002); Lane v. Schenck, 614 A.2d 786, 789 (Vt. 1992); Momb v. Ragone, 130 P.3d 406, 412–14 (Wash. Ct. App. 2006); Rowsey v. Rowsey, 329 S.E.2d 57, 61 (W. Va. 1985); Watt v. Watt, 971 P.2d 608, 614–16 (Wyo. 1999).

[23] *See In re Marriage of Fingert*, 221 Cal. App. 3d at 1582; *Watt*, 971 P.2d at 614–16; *see also* Hyland, *supra* note 17, at 242–53 ("[The right to travel] was granted federal protection against state abridgement by the Framers of the Fourteenth Amendment who intended to protect fundamental rights from state abridgement. Consequently, the right to travel is guaranteed protection against state abridgement within the borders of the state by the Privileges or Immunities Clause of the Fourteenth Amendment. Therefore, the states may not abridge the right to intrastate travel.").

[24] *See, e.g.*, *In re Marriage of Cole*, 729 P.2d at 1280 ("As a fundamental right, the right to travel interstate can only be restricted in support of a compelling state interest.").

[25] *See In re Marriage of Ciesluk*, 113 P.3d at 142–43.

[26] *See id*. at 143.

[27] *See Watt*, 971 P.2d at 615–16.

[28] *Id.* at 612.

the District Court for Weston County changed custody to the father.[29] In reversing the trial court's decision, the Wyoming Supreme Court held:

> The custodial parent's right to move with the children is constitutionally protected, and a court may not order a change in custody based upon that circumstance alone. Some other change of circumstances, together with clear evidence of the detrimental effect of the other change upon the children, is required. Such a circumstance necessarily would have to be sufficiently deleterious to the welfare of the children that by itself it would serve as a substantial and material change in circumstances even in the absence of a relocation.[30]

In *Watt*, the Wyoming Supreme Court stated that when reviewing a relocation case, the reviewing court "must remember that the best interest of the child standard was applied at the time of the initial custody award."[31] In essence, the best interest standard cannot be revisited in Wyoming due to the relocation of a parent because of the parent's constitutional right to travel.[32]

B. Pure Balancing Test

In Colorado, New Mexico, Indiana, Maryland, and Florida, appellate courts have adopted what appears to be a pure balancing test between a custodial parent's constitutional right to travel, rights of the non-custodial parent, and the best interest of the child, without any burdens or presumptions to any of the aforementioned interests.[33]

In *In re Marriage of Ciesluk*, the Colorado Supreme Court recognized that a majority time parent's right to travel was not the only fundamental right at stake.[34] The *Ciesluk* court, citing the United States Supreme Court case of *Troxel v. Granville*, held that "a minority time parent has an equally important constitutional right to the care and control of the child."[35] The Colorado Supreme

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[29] *Id.*

[30] *Id.* at 616–17.

[31] *Id.* at 614.

[32] *See* Emilia P. Wang, *Unenumerated Rights—Are Unenumerated Rights a Viable Source for the Right to Intrastate Travel?* Watt v. Watt*, 971 P.2d 608 (Wyo. 1999)*, 31 RUTGERS L.J. 1053, 1056–59 (1999).

[33] *See In re Marriage of Ciesluk*, 113 P.3d at 142; *Fredman*, 960 So.2d at 57–59; *Baxendale*, 878 N.E.2d at 1259; *Braun*, 750 A.2d at 628–29; *Jaramillo*, 823 P.2d at 304–06.

[34] 113 P.3d at 142.

[35] *In re Marriage of Ciesluk*, 113 P.3d at 142 (citing Troxel v. Granville, 530 U.S. 57, 65 (2000)).

Court further found that intertwined with parents' competing constitutional rights is concern for the best interest of the child.[36] Thus, the *Ciesluk* court concluded that "relocation disputes present courts with a unique challenge: to promote the best interest of the child while affording protection equally between a majority parent's right to travel and a minority parent's right to parent."[37] Interestingly, the Colorado Supreme Court noted that "in the absence of demonstrated harm to the child, the best interest of the child standard is insufficient to serve as a compelling state interest overruling the parents' fundamental rights."[38] *Ciesluk* recognized that a trial court in Colorado must consider and make findings based on the twenty-one factors set out in Colorado Statute § 14-10-129 for a majority time parent's relocation.[39] Furthermore, *Ciesluk* required that both parents share equally the burden of demonstrating how the child's best interests will be served.[40] The *Ciesluk* court held that in a relocation case, it must balance the competing constitutional rights of each parent with the child's best interests, with neither party having a presumption or burden of proof. The Colorado Supreme Court in *Ciesluk* held that this balancing test was required for a trial court to properly rule on the relocation of a majority time parent.[41] Subsequent to the Colorado Supreme Court's holding in *Ciesluk*, appellate courts in Indiana and Florida have adopted the pure balancing analysis found in *Ciesluk*.[42]

The *Ciesluk* court borrowed this balancing test from the New Mexico Supreme Court.[43] In *Jaramillo v. Jaramillo*, the New Mexico Supreme Court not only considered both the majority time parent's right to travel and the state's concerns in protecting the best interests of the child, but also the minority time parent's right to maintain close association and frequent contact with the child.[44] In *Jaramillo*, the parents had joint legal custody and the mother had "physical custody" of the child.[45] The mother requested to move with the child to New Hampshire because of new employment and to be closer to her family.[46] The trial

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[36] *Id.*

[37] *Id.*

[38] *Id.* (noting that no Colorado court has held that the best interests of the child are a compelling state interest that obviates the need to balance the competing constitutional rights of parents).

[39] *Id.* at 148.

[40] *Id.* at 147.

[41] *See id.* at 148.

[42] *Fredman*, 960 So.2d at 57–59; *Baxendale*, 878 N.E.2d at 1259 ("In short, we agree with the recent well-reasoned opinion of the Colorado Supreme Court that the trial court is to balance these considerations.").

[43] *Jaramillo*, 823 P.2d at 304–06.

[44] *Id.*

[45] *Id.* at 301. The court defined "physical custody" as meaning the parent in which the child resides "more than half the time." *Id.* at 304.

[46] *Id.* at 302.

court applied a presumption in favor of a custodial parent's relocation and granted the mother's move to New Hampshire.[47] After the New Mexico Court of Appeals reversed and remanded the case for a new determination of the best interest of the child based on a presumption against the move, the New Mexico Supreme Court reviewed the case.[48] The New Mexico Supreme Court determined that a parent wishing to relocate should not be burdened by an adverse presumption because it "unconstitutionally impairs the relocating parent's right to travel."[49] It also determined that the non-primary parent should not be burdened with a presumption in the relocating parent's favor, because the resisting parent has a fundamental liberty interest in parenting.[50] Instead, the New Mexico Supreme Court concluded that:

> [N]either parent will have the burden to show that relocation of the child with the removing parent will be in or contrary to the child's best interests. Each party will have the burden to persuade the court that the new custody arrangement or parenting plan proposed by him or her should be adopted by the court, but that party's failure to carry this burden will only mean that the court remains free to adopt the arrangement or plan that it determines best promotes the child's interests.[51]

The *Jamarillo* court found that although the best interests of the child are of primary importance in making this determination, these interests alone do not automatically overcome the constitutional rights of the parents, which must be weighed against each other in the best interest analysis.[52] The Maryland Court of Special Appeals has directly adopted the *Jamarillo* court's balancing test for a parent's right to travel.[53]

C. Best Interest of Child is Controlling State Interest

The appellate courts of Minnesota, Idaho, West Virginia, Alabama, Arizona, Kansas, Rhode Island, New Jersey, Nevada, Montana, Massachusetts, and Washington all recognize that a parent's right to travel is a fundamental right protected by the United States Constitution and should be protected when

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[47] *Id.*

[48] *Id.*

[49] *Id.* at 305.

[50] *Id.* at 306.

[51] *Id.* at 309.

[52] *See id.*

[53] *Braun*, 750 A.2d at 635.

the parent desires to relocate.[54] However, these appellate courts found that the furtherance of the best interests of children may constitute a compelling state interest worthy of reasonable interference with a parent's right to travel.[55] In essence, these appellate courts still recognize and analyze a parent's right to travel, but these courts simply "elevate the child's welfare to a compelling state interest, thereby obviating the need to balance the parents' competing constitutional rights."[56]

The Montana Supreme Court was one of the first courts to recognize and analyze a custodial parent's right to travel in the context of a relocation action.[57] In *In re Marriage of Cole*, the Montana Supreme Court announced for the first time that the United States Constitution protects the custodial parent's right to interstate travel and such a right is clearly implicated when the custodial parent desires to relocate with his or her child.[58] However, the *Cole* court also noted that "[w]e believe that furtherance of the best interest of a child, by assuring the maximum opportunities for the love, guidance and support of both natural parents, may constitute a compelling state interest worthy of reasonable interference with the right to travel interstate."[59] The *Cole* court concluded its analysis with a word of caution, stating that "any interference with this fundamental right must be made cautiously, and may only be made in furtherance of the best interest of the child."[60]

In these state appellate courts, placement of the burden of proof to demonstrate whether the relocation is in the best interest of the child plays a factor in determining the weight the court places upon the parent's right to

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[54] *See Everett*, 660 So.2d at 601–02; *Pollock*, 889 P.2d at 635 ("The competing rights at the heart of this case are the Mother's right to travel and the Father's right to maintain a meaningful relationship with his child. These rights must be adjusted in accordance with the best interests of the child."); *Bartosz*, 197 P.3d at 322–24; *Carlson*, 661 P.2d at 836; *Mason*, 850 N.E.2d at 521 (holding the right of parent to relocate with child is subject to the State's power to promote child's best interests); *LaChapelle*, 607 N.W.2d at 163; *In re* Marriage of Thorner, 190 P.3d 1063, 1068–69 (Mont. 2008); *Reel*, 60 P.3d at 482–84; *Murnane*, 552 A.2d at 198; *Momb*, 130 P.3d at 412–14; *Africano*, 837 A.2d at 724; *Rowsey*, 329 S.E.2d at 61 ("The paramountcy of child welfare may, however, supersede the right to travel.").

[55] *See, e.g.*, *In re Marriage of Cole*, 729 P.2d at 1280 ("We believe that furtherance of the best interests of a child, by assuring the maximum opportunities for the love, guidance and support of both natural parents, may constitute a compelling state interest worthy of reasonable interference with the right to travel interstate.").

[56] *In re Marriage of Ciesluk*, 113 P.3d at 144 (citing *LaChapelle*, 607 N.W.2d at 163).

[57] *In re Marriage of Cole*, 729 P.2d at 1280.

[58] *Id.* (citing *Shapiro*, 394 U.S. at 634, *overruled on other grounds by Edelman*, 415 U.S. at 671).

[59] *Id.* (citing Ziegler v. Ziegler, 691 P.2d 773 (Idaho 1984)).

[60] *Id.*

travel.[61] When a court places this burden on the non-moving parent, the parent must necessarily provide sufficient proof that a travel restriction is, in fact, in the best interest of the child in order to sufficiently defeat the custodial parent's right to travel.[62] Whereas, in states where the custodial parent must bear the burden of demonstrating that the relocation is in the best interest of the child, the parent's right to travel is even more encumbered because the custodial parent begins on unequal footing in an attempt to enforce his or her constitutional right to travel.[63]

D. Non-Custodial Parent's Right to Visitation is Controlling

In Illinois, New Jersey, and North Dakota, appellate courts have found that the protection of the non-custodial parent's right to visitation would justify a compelling governmental interest to restrict the custodial parent's right to travel.[64] These jurisdictions hold that the non-custodial parent's right to visitation with the child is a compelling state interest, thereby precluding the court's need to balance such right against the custodial parent's right to travel.[65] These jurisdictions, in particular, appear to be guided by a general principle that the well-being of the minor child is often dependent upon maintaining a loving and supportive relationship with the non-custodial parent.[66] In determining that the non-custodial parent's right to visitation is a compelling state interest, the North Dakota Supreme Court, in *McRae v. Carbno*, recognized this relationship interest, stating that "in our state, there is a legally recognizable right of visitation between a child and the noncustodial parent which is considered to be in the best

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[61] Of these aforementioned states, Minnesota, Washington, and West Virginia place the burden on the non-removing parent to demonstrate that the best interest of the child requires that the child not be removed from the state, whereas Alabama, Arizona, Idaho, and New Jersey require the moving custodial parent to demonstrate the move is in the child's best interest. Kansas, Nevada, Rhode Island and Montana do not place a burden on either parent. *See supra* notes 2–4.

[62] *See In re Marriage of Cole*, 729 P.2d at 1280.

[63] *See Jaramillo*, 823 P.2d at 307 (quoting Stanley v. Illinois, 405 U.S. 645, 656–57 (1972)) ("[Placement of burdens in relocation cases] needlessly risks running roughshod over the important interests of both parent and child."). *But see Bartosz*, 197 P.3d 310 (stating that placing the burden on the moving parent to show that it is in the best interest of the child to relocate is not tantamount to placing a presumption against relocation). *See also* Theresa Glennon, *Still Partners?: Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105, 124 (2007) ("Legal tests favoring the relocating parent often, but not always, resulted in more favorable decisions for the relocating parent.").

[64] *See In re Marriage of Manuele*, 438 N.E.2d at 695; *Murnane*, 552 A.2d at 198 (finding a compelling state interest is "the visitation rights of the noncustodial parent and the interest of the child in maintaining a close relationship with that parent"); *McRae*, 404 N.W.2d at 509–10.

[65] *See, e.g.*, *In re Marriage of Manuele*, 438 N.E.2d at 695 ("[A] person's right to travel may be restricted if done for the promotion of a compelling government interest. Here, the protection of petitioner's rights of visitation would justify a reasonable residential restriction as a condition of respondent's custody of the children.").

[66] *See, e.g.*, Baures v. Lewis, 770 A.2d 214, 223–33 (N.J. 2001).

interests of the child."[67] The *McRae* court also found that placing a burden upon the custodial parent to relocate with the child did not unnecessarily interfere with the custodial parent's right to travel.[68] In justifying this presumption in favor of the non-custodial parent, the *McRae* court stated:

> The statutory recognition of visitation rights between a child and the noncustodial parent is consistent with placing the burden upon the custodial parent to show that moving the child to another state is in the child's best interest. We conclude that there is no presumption that a custodial parent's decision to change the child's residence to another state is in the child's best interests. We are unpersuaded that it would be consistent with our statutes or otherwise appropriate to adopt such a presumption, and we refuse to do so.[69]

Although these appellate courts recognize the right to travel in the context of relocation cases, these courts found that a non-custodial parent's right to visitation with his or her child is a compelling state interest, which can trump the custodial parent's right to travel. These courts further find no harm in placing the burden on the moving parent to show it is in the child's best interest to move with the custodial parent.[70]

E. Custodial Parent's Right to Travel Not Implicated in Relocation

The Texas Court of Appeals has held that removal cases do not implicate a parent's right to travel because the custodial parent is never actually prohibited from outright travel.[71] Rather, the parent is only prohibited from traveling with the child.[72] In *In re C.R.O.*, the parents were divorced in Georgia, where the mother was awarded primary custody of the two minor children.[73] A few months later, the mother remarried and moved to Fort Bend County, Texas to

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[67] *McRae*, 404 N.W.2d at 509.

[68] *See id.*

[69] *Id.* at 509–10 (citation omitted).

[70] Each of the three states place the burden to prove the relocation is in the child's best interest upon the moving custodial parent. *See* 750 ILL. COMP. STAT. § 5/609(a) (2008); *Baures*, 770 A.2d at 218; Maynard v. McNett, 710 N.W.2d 369, 371 (N.D. 2006).

[71] *In re* C.R.O., 96 S.W.3d 442, 452 (Tex. App. 2002); Bates v. Texar, 81 S.W.3d 411, 435–36 (Tex. Ct. App. 2002); Lenz v. Lenz, 40 S.W.3d 111, 118 (Tex. App. 2000), *rev'd on other grounds*, 79 S.W.3d 10 (Tex. 2002).

[72] *See, e.g.*, *Lenz*, 40 S.W.3d at 118 (holding because the domicile restriction is only upon the child, and not the custodial mother, the mother is free to travel anywhere she desires and her right to travel is unabridged).

[73] 96 S.W.3d at 445.

live with her new husband. The father moved to Florida to begin a new job.[74] Approximately five years after moving to Texas, the mother notified the father of her intent to relocate with their two children to Hawaii so her new husband could take a position with a substantial pay increase.[75] The father filed a motion requesting the children's domicile be restricted to Fort Bend County.[76] After filing his motion, the father rented an apartment in Fort Bend County, quit his job in Florida and began working in Texas.[77] The 387th District Court in Fort Bend County, Texas granted the father's motion and restricted the children's domicile to "Fort Bend County and the contiguous counties so long as [the father] continues to reside in that area."[78] The mother appealed, arguing *inter alia*, that the trial court's order violated her constitutionally protected right to travel.[79] However, the Texas Court of Appeals dismissed the mother's argument and upheld the district court's domicile restriction, stating that "[t]he domicile restriction imposed by the trial court applied only to the children and did not affect [the mother's] ability to exercise any of the aforementioned rights."[80]

The Michigan Court of Appeals has also refused to analyze a custodial parent's right to travel.[81] In the unpublished decision of *Beaton v. Beaton*, the mother appealed a trial court's order of joint physical custody which required the children be enrolled in the Marysville School District.[82] The mother contended that a number of provisions within the court's order violated her constitutional right to travel, including the court's provision that the children must be kept in the Marysville School District. The court summarily found that a parent's right to travel was not worth analyzing, stating "given the compelling interest of Michigan in the 'best interest of the children,' as they are affected by the dissolution of their parents' marriage . . . we are aware of no characterization of a constitutional 'right to travel' that would enable such a right to prevail over a judicial 'best interests' determination."[83] Similarly, in *Clapper v. Clapper*, the Pennsylvania Superior Court found the custodial parent's right to travel did not warrant analysis when determining the parent's ability to relocate and concentrated solely on the best interests of the child.[84]

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[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 445–46.

[78] *Id.* at 446.

[79] *Id.* at 452.

[80] *Id.*

[81] Beaton v. Beaton, No. 202753, 1998 WL 1993003, at *4 (Mich. Ct. App. Feb. 3, 1998).

[82] *Id.* at *1.

[83] *Id.* at *4.

[84] 578 A.2d at 21.

In *Lane v. Schenck*, the custodial mother notified the non-custodial father that she was planning to relocate with the children from Vermont to Iowa to attend law school.[85] The father moved the Caledonia Family Court to change the custodial arrangement to one which would prohibit the mother from relocating with the children.[86] The court responded to the father's motion by prohibiting the mother to relocate any further than a drive of "four hours one way" from the father.[87] The mother appealed, arguing, *inter alia*, that the trial court's order, which conditioned her right to continued custody on the requirement she remain within a four hour drive from the father's residence, violated her constitutionally protected right to travel.[88] The Vermont Supreme Court reversed the Caledonia Family Court's decision, thus allowing the mother to relocate to Iowa.[89] However, the Vermont Supreme Court dismissed the mother's constitutional right to travel argument, stating:

> We do not view the issue as falling solely within the right to travel, since either party is free to move wherever the party wants. The issue actually involves a determination of the proper parental custodian, given the best interests of the children. While freedom of movement from state to state is implicated, it is unnecessary to elevate the issue presented here to a constitutional dimension. Where a parent lives in relation to the other parent is just one factor of many to be considered in formulating a custody decision. Certainly, the visiting parent could not defeat the custodial parent's rights and responsibilities by asserting a constitutional right to travel.[90]

In essence, the Vermont Supreme Court has ruled it unnecessary to perform a constitutional analysis of a parent's right to travel, because the best interest of the child is the paramount issue before the court in a relocation case.

Perhaps the most troubling relocation analysis comes from the Louisiana Court of Appeals.[91] In *Bezou v. Bezou*, the custodial mother left the state of Louisiana with her children to take a position as an attorney in Washington, D.C.[92] The Civil District Court for the Parish of Orleans modified the custody arrangement, awarding custody of the youngest of the two children to the father

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[85] 614 A.2d at 787.

[86] *Id.* at 787–88.

[87] *Id.* at 788.

[88] *Id.* at 789.

[89] *Id.* at 789–92.

[90] *Id.* at 789.

[91] 436 So. 2d 592 (La. Ct. App. 1983).

[92] *Id.* at 593.

still residing in Louisiana.[93] At trial, the mother argued that custody modification based on her relocation would interfere with her right to travel.[94] In the trial court's order, the judge stated the following:

> She accuses this court of "placing a chill on her constitutional right to travel." She does not accept the notion that she placed a chill on her right to travel when she bore and started to raise two children. She does not want this court to restrict her legal right to travel. She does not realize that her right to travel, though not legally, was from a practical point of view restricted when she chose to play the role of mother years ago.[95]

Upon examination of the record, the Court of Appeals of Louisiana found no abuse of discretion by the trial judge, and ignored the constitutional right to travel issue entirely.[96]

II. ANALYSIS OF OTHER COMPETING RIGHTS AND INTERESTS

There are a plethora of reasons given by courts when justifying the restriction on a custodial parent's ability to relocate with his or her child. However, the underlying cause behind each justification is safeguarding the welfare of the child.[97] Therefore, almost every relocation case is couched in terms of whether or not the move is in the child's best interest.[98] In large part, courts have found two reasons to justify a majority of restrictions on custodial parent's relocation: (1) it is the best interest of the child to live within the particular state, and (2) the move detrimentally affects the non-custodial parent's visitation rights.

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[93] *Id.*

[94] *Id.*

[95] Anne L. Spitzer, *Moving and Storage of Postdivorce Children: Relocation, The Constitution and the Courts*, 1985 ARIZ. ST. L.J. 1, 25 n.195 (1985) (quoting Bezou v. Bezou, No. 81-11606 (C.D.C. Orleans June 3, 1983)).

[96] *Id.* (citing *Bezou*, 436 So. 2d at 593).

[97] Edward Sivin, *Residence Restrictions on Custodial Parents*: *Implications for the Right to Travel*, 12 RUTGERS L.J. 341, 350 (1981).

[98] *See, e.g.*, Thomas v. Thomas, 739 A.2d 206 (Pa. Super. Ct. 1999) (remanding a case because the trial court failed to make sufficient findings regarding whether the custodial parent's proposed move would be in the child's best interest).

A. State's Interest in Protecting Welfare of the Child by Maintaining Child Within Jurisdiction

Several jurisdictions have made both judicial and legislative policy stating it is generally best to keep minor children within the state.[99] To further this policy, several states place a burden on a custodial parent to prove the relocation is in the best interest of the child before the parent can relocate outside the state.[100] Additionally, every state except Michigan requires the custodial parent request permission before relocating outside the state with the child.[101] The United States Supreme Court has held that a state has the "right" and the "duty" to protect its minor children.[102] Federal courts agree, finding that "a state seeks to further a legitimate state interest when it sets out to protect the welfare of its citizens of tender age."[103]

Courts often justify, in part, that denying a custodial parent's petition to relocate on the basis of maintaining the child within the state allows the state to protect the child and assists the court in exercising its jurisdiction over the child.[104] However, the fallacy behind this logic is simple: no state can claim that another state could not equally protect the child.[105] In reality, a state's interest in keeping the child within the state is based upon two overriding issues: (1) the antiquated concerns of parental kidnapping and parental forum shopping, and (2) protecting the visitation rights of the non-custodial parent.

Residential restrictions on the custodial parent have historically been justified as necessary to enforce the home state's custody decree.[106] There was traditionally great concern that if a custodial parent was allowed to move, the custodial parent would petition the court of the new state and nullify the former state's order.[107]

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[99] *See, e.g.*, Vanderzee v. Vanderzee, 380 N.W.2d 310, 311 (Neb. 1986) ("Generally, the best policy in divorce cases is to keep minor children within the jurisdiction, but the welfare of the child is the paramount consideration.").

[100] *See supra* note 3.

[101] *See supra* note 6.

[102] Stanley v. Illinois, 405 U.S. 645, 649 (1972).

[103] Alsager v. District Court, 406 F. Supp. 10, 22 (S.D. Iowa 1975), *aff'd in part*, 545 F.2d 1137 (8th Cir. 1976).

[104] Murnane v. Murnane, 552 A.2d 194, 198 (N.J. Super. Ct. App. Div. 1989).

[105] LaFrance, *supra* note 7, at 137.

[106] Sivin, *supra* note 97, at 351.

[107] *See, e.g.*, Stuessi v. Stuessi, 307 S.W.2d 380, 381 (Mo. Ct. App. 1957) ("Generally speaking, it is against the policy of the law to permit the removal of a minor child to another jurisdiction, due principally to the fact that upon entry of a decree of divorce, the child becomes the ward of the court, and that upon its removal to another state, any subsequent order made pursuant to the court's continuing jurisdiction may be difficult, if not impossible, of enforcement.").

However, this concern is outdated. All fifty states, the District of Columbia, and the U.S. Virgin Islands have adopted some form of the Uniform Child Custody Jurisdiction Act (UCCJA), first promulgated in 1968.[108] In 1997, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in an effort to rectify shortcomings perceived in the UCCJA.[109] To date, forty-six states, along with the District of Columbia and the U.S. Virgin Islands, have adopted the UCCJEA.[110] Both the UCCJA and the UCCJEA provide that a state has jurisdiction to make an initial custody determination if it is the home state of the child on the date of the commencement of the proceedings for the past six months, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from the state but a parent or person acting as a parent continues to live the state.[111] Furthermore, with only a few exceptions, both the UCCJA and the UCCJEA do not allow a state court to modify a child custody determination made by a court of another state, unless the other state court acquiesces.[112]

Further justifying the containment of minor children within the state is the concern about parental kidnapping. However, on December 20, 1980, Congress enacted the Parental Kidnapping Prevention Act of 1980. Section 8 of the Act provides for recognition and enforcement of out-of-state custody decrees and limits a court's ability to modify such decrees.[113] The combined results of the Parental Kidnapping Prevention Act and the UCCJA / UCCJEA are that child custody decrees are enforceable in sister states, and courts are severely limited in their ability to modify those decrees. Thus, the purpose of maintaining and enforcing decrees is no longer a compelling reason for imposing residential restrictions on custodial parents.

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[108] UNIF. CHILD CUSTODY JURISDICTION ACT (1968) [hereinafter UCCJA]; *see also* Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N.D. L. REV. 301, 302 (1999); David Carl Minneman, Annotation, *Construction and Operation of Uniform Child Custody Jurisdiction and Enforcement Act*, 100 A.L.R. 5th 1, § 2 (2002).

[109] UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT (1997) [hereinafter UCCJEA]. *See also In re* McCoy, 52 S.W.3d 297, 302 (Tex. App. 2001).

[110] Uniform Law Commissioners: The National Conference of Commissioners on Uniform State Laws, A Few Facts About The Uniform Child Custody Jurisdiction & Enforcement Act, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uccjea.asp (last visited Nov. 11, 2009); UCCJEA Adoptions, http://www.nccusl.org/nccusl/docs/UCCJEAadoptions.pdf (last visited Nov. 11, 2009) lists states that have adopted the Uniform Act.

[111] UCCJA § 3; UCCJEA § 201.

[112] UCCJA § 14; UCCJEA § 203.

[113] Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, §§ 6–10, 94 Stat. 3568–73 (1980) (codified in scattered sections of 28, 42 U.S.C. (2006)).

In relocation cases, it is evident from each court's rhetoric that they are protecting the state's interest in the child's welfare. However, courts only act when the non-custodial parent opposes the custodial parent's proposed relocation. Hence, the reality is that the state is often attempting to act as the agent of the non-custodial parent.[114] Such is the case, for instance, in *Murnane v. Murnane*, where the custodial mother argued the trial court's prohibition against her move to Orlando, Florida violated her constitutional right to travel.[115] At the time of the divorce, the mother lived in Pennsylvania and the non-custodial father lived in New Jersey, where the parties' homes were approximately forty miles from each other.[116] The mother subsequently sought permission of the court to move to Florida with the child. In rejecting the mother's argument that her right to travel was infringed by restricting her from moving to Florida, the New Jersey Superior Court stated:

> In a case such as the present one, the State has a strong interest in properly adjudicating custody in order to assure the welfare of a minor. If the two parties claiming custody each proposes to live in a different jurisdiction, the court is bound to take that fact into consideration. If the court has adjudicated custody on the assumption of residence within New Jersey so as to protect, among other things, the visitation rights of the noncustodial parent and the interest of the child in maintaining a close relationship with that parent, the court must necessarily have the right to prevent the custodial parent from thereafter moving the child to a location whose distance would thwart the interests of the child and of the noncustodial parent.[117]

Clearly, the *Murnane* court found it permissible to act as an agent for the non-custodial parent. However, only the non-custodial parent has a legal right to visitation with his or her child, as the state itself should have no interest in visitation rights. To hold otherwise would allow the state to act as an agent for the non-custodial parent and find that the state's interests are adverse to the custodial parent. The state's interest should only be adverse to that of a parent's in cases when the parent's actions or inactions are causing harm to the welfare of the child.[118] Therefore, without any demonstration of endangerment to the child, a

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[114] LaFrance, *supra* note 7, at 91.

[115] 552 A.2d at 198.

[116] *Id.* at 196.

[117] *Id.* at 198.

[118] *See In re* A.I., 825 N.E.2d 798, 804 (Ind. Ct. App. 2005) (stating that the traditional right of a parent to establish a home and raise his or her children is protected by the Fourteenth Amendment of the U.S. Constitution; this right can only be interfered upon by the state to protect the child from endangerment).

state itself would *not* have a compelling interest to prohibit the custodial parent from relocating outside of the state and, thus, could not inhibit the parent's right to travel.

B. Visitation Rights of Non-Custodial Parent

A custodial parent's right to travel is not the sole constitutional right involved in a relocation case.[119] The United States Supreme Court has held that parenting is a fundamental right that cannot be significantly diminished or abrogated without a compelling state interest.[120] The right of parents to control the upbringing of their children was first acknowledged by the United States Supreme Court in 1923 in *Meyer v. Nebraska*.[121] Some courts have found that the non-custodial parent has an equally important right to the care and control of the child as the custodial parent, and such right should be included when considering whether to allow the custodial parent to relocate with the minor child.[122] However, the constitutional protections of parental rights are likely inapplicable in a dispute between two natural parents.[123] For instance, in *Arnold v. Arnold*, the father argued that the trial court violated the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution when he was awarded 102 days a year in parenting time with his children during divorce proceedings.[124] Specifically, the father claimed the unequal physical placement of his children deprived him of a fundamental liberty interest in equal participation in the raising of his children.[125] In rejecting the father's constitutional argument, the Wisconsin Court of Appeals held that a parent's fundamental right to the care and custody of his or her children is inapplicable to a dispute between two natural parents after a divorce.[126]

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[119] David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1474–84 (2006).

[120] Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345, 1351 (2005) (citing several United States Supreme Court cases, including Troxel v. Granville, 530 U.S. 57 (2000)).

[121] 262 U.S. 390, 401 (1923).

[122] *See In re* Marriage of Ciesluk, 113 P.3d 135, 142 (Colo. 2005) (citing *Troxel*, 530 U.S. at 65 ("The liberty interest at issue in this case—interest of the parents in the care, custody, and control of their children—is perhaps the oldest fundamental liberty interest recognized by this Court.")).

[123] *Meyer*, *supra* note 119, at 1478.

[124] 679 N.W.2d 296, 298 (Wis. Ct. App. 2004).

[125] *Id.*

[126] *Id.* at 299; *see also* McDermott v. Dougherty, 869 A.2d 75, 808–09 (Md. 2005); *In re* R.A., 891 A.2d 564, 576 (N.H. 2005); Griffin v. Griffin, 581 S.E.2d 899, 902 (Va. Ct. App. 2003); Jacobs v. Jacobs, 507 A.2d 596, 599 (Me. 1986).

A parent's right to visitation with his or her minor child is "considered natural, inherent, and arising from the very fact of parenthood."[127] However, so far, no United States Supreme Court case has recognized visitation as a fundamental interest of non-custodial parents entitling them to substantial due process.[128] Although not considered a constitutional right, courts have consistently found that a non-custodial parent has a "right" to visitation with his or her child.[129] In particular, courts have often allowed or disallowed a custodial parent's request to relocate on the basis of whether or not the non-custodial parent could maintain a "meaningful" relationship with his or her child after relocation.[130] Furthermore, at least one state court has held that a non-custodial parent has a "constitutionally protected 'inherent right' to a meaningful relationship with his children."[131]

Although courts have found that the non-custodial parent has a right to visitation with his or her child, these same courts have found that maintaining existing visitation patterns should not be the sole justification precluding a custodial parent's relocation.[132] Perhaps no court has laid out the difficulties involved in relocations cases better than in *Gruber v. Gruber*, where the Pennsylvania Superior Court stated:

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[127] Ayelet Blechet-Prigat, *Rethinking Visitation: From a Parental to Relational Right*, 16 DUKE J. GENDER L. & POL'Y 1, 3 (2009) (citing *In re* Marriage of L.R., 559 N.E.2d 779, 789 (Ill. App. Ct. 1990)); *accord* Chandler v. Bishop, 702 A.2d 813, 817–18 (N.H. 1997).

[128] Blechet-Prigat, *supra* note 127, at 3.

[129] Elizabeth Weiss, *Nonparent Visitation Rights v. Family Autonomy: An Abridgment of Parents' Constitutional Rights?*, 10 SETON HALL CONST. L.J. 1085, 1092–97 (2000); *see, e.g.*, *Murnane*, 552 A.2d at 198 (finding that the visitation rights of the noncustodial parent and the interest of the child in maintaining a close relationship with that parent can trump a custodial parent's constitutional right to travel and relocate to another state with the minor child).

[130] *See, e.g.*, Farnsworth v. Farnsworth, 597 N.W.2d 592, 601 (1999) (allowing a mother to move from Omaha to Denver, a distance of over 500 miles, because a reasonable schedule allowed the father to maintain a meaningful relationship with the child even though the father had never missed any of his visitation and he spent time with the child throughout the year equal to approximately one-half of all the days in the year); Stout v. Stout, 560 N.W.2d 903, 919 (N.D. 1997) (finding that moving from North Dakota to Arkansas still allowed for a father to have a meaningful relationship with his child); Tropea v. Tropea, 665 N.E.2d 145, 149 (N.Y. 1996) (allowing a mother to move 2 1/2 hours away because it would still allow the father to have "meaningful access" to his son); Baldwin v. Baldwin, 710 A.2d 610, 614 (Pa. Super. Ct. 1998) (not allowing a mother to move from Pennsylvania to South Carolina because such move "could very well thwart the development of a healthy relationship between [the child] and her father"); *see also In re* Marriage of Leyda, 355 N.W.2d 862, 866 (Iowa 1984) ("[The Iowa Supreme Court] has long recognized the need for a child of divorce to maintain meaningful relations with both parents.").

[131] Schutz v. Schutz, 581 So.2d 1290, 1293 (Fla. 1991).

[132] *See* Hicks v. Hicks, 388 N.W.2d 510, 515 (1986) (holding a reduction in visitation does not necessarily preclude a custodial parent from relocating for a legitimate reason); *see also* Auge v. Auge, 334 N.W.2d 393, 398 (Minn. 1983); D'Onofrio v. D'Onofrio, 365 A.2d 27, 30 (N.J. 1976).

> "Every parent has the right to develop a good relationship with the child, and every child has the right to develop a good relationship with both parents." The task of this court is to sacrifice the non-custodial parent's interest as little as possible in the face of the competing and often compelling interest of a custodial parent who seeks a better life in another geographical location.[133]

While no court has found that a non-custodial parent has a constitutionally protected right to a set visitation schedule, the Florida Supreme Court has held a non-custodial parent *does* have a constitutionally protected right to a meaningful relationship with his or her child.[134] Moreover, in the 1978 case *Quillon v. Walcott*, the United States Supreme Court found the "relationship between parent and child is constitutionally protected."[135] In *Franz v. United States*, the United States Court of Appeals for the District of Columbia Circuit held that a father's right to the companionship of his son is constitutionally protected.[136] Furthermore, some state courts have held that a parent has a constitutionally protected liberty interest to visitation with his or her children.[137] The bottom line is that visitation rights provide the only means for a non-custodial parent to maintain a meaningful relationship with a child.[138] Given this truth, it must be acknowledged by courts that a non-custodial parent has a constitutional right to visitation with his or her child, absent a compelling reason to deny such right.[139]

Generally, a parent's ability to visit his or her child is limited only by the welfare of the child.[140] Furthermore, most states hold as a matter of policy, it is generally in the child's best interest for the child to have regular contact with

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[133] 583 A.2d 434, 438 (Pa. Super. Ct. 1990) (citations omitted); Blechet-Prigat, *supra* note 127, at 5 ("Visitation provides the only means to enable a non-custodial parent to maintain a relationship with the child. In essence, denying visitation is tantamount to terminating the parental rights of the non-custodial parent. Nevertheless, the constitutionality of parent's visitation rights remains debatable . . . .").

[134] *Schultz*, 581 So.2d at 1293.

[135] 434 U.S. 246, 255 (1978).

[136] 707 F.2d 582, 594–602 (D.C. Cir. 1983).

[137] *In re* C.J., 729 A.2d 89, 94 (Pa. Super. Ct. 1999) (citing Santosky v. Kramer, 455 U.S. 745 (1982)).

[138] Blechet-Prigat, *supra* note 127, at 5.

[139] *See, e.g.*, Hoversten v. Superior Court, 74 Cal. App. 4th 636, 641 (Cal. Ct. App. 1999) ("[T]he relationship between parent and child is so basic to the human equation as to be considered a fundamental right, and that relationship should be recognized and protected by all of society, no less jailers. Interference with that right should only be justified by some compelling necessity, i.e., a parent dangerously abusing a child . . . .") (quoting *In re* Smith 112 Cal. App. 3d 956, 968–69 (Cal. Ct. App. 1980)).

[140] *See, e.g.*, McAlister v. Shaver, 633 So.2d 494, 496 (Fla. Dist. Ct. App. 1994) ("Visitation with a child should never be denied as long as the visiting parent conducts himself or herself, while in the presence of the child, in a manner which will not adversely affect the child's morals

both parents.[141] However, there can be no assertion that a non-custodial parent is constitutionally entitled to a given schedule of visitation. Moreover, in situations of relocation by the custodial parent, courts have often noted the flexibility of a non-custodial parent's visitation when allowing the custodial parent to relocate.[142] For example, the Wisconsin Supreme Court stated:

> Visitation is a flexible arrangement that the parents and the court can modify as circumstances require without undermining the relationship of the child and the noncustodial parent. . . . Visitation arrangements depend on circumstances, such as the proximity of the child's residence to that of the noncustodial parent and the needs of the child. In short, visitation arrangements reflect a variety of approaches to encouraging a relationship between the child and the noncustodial parent—they do not reflect the existence of a noncustodial parent's inviolate right to any particular arrangement.[143]

Therefore, a non-custodial parent's right to visitation must be balanced with the custodial parent's right to travel. In doing so, the court must consider the possible adverse effect of elimination or curtailment of a child's association with non-custodial parent; in this context, reasonableness of an alternative visitation arrangement should be assessed and the fact that visitation by non-custodial parent will be changed to his or her disadvantage cannot be controlling.[144]

C. Best Interest of the Child

The "best interest" doctrine "affects the placement and disposition of children in divorce, custody, visitation, adoption, the death of a parent, illegitimacy proceedings, abuse proceedings, neglect proceedings, crime, economics, and all forms of child protective services."[145] In custodial relocation cases, the cardinal

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or welfare."). *But see* Dawn D. v. Superior Court of Riverside County, 952 P.2d 1139, 1148 (Cal. 1998) (holding that the biological father of a child born to woman married to another man did not have a constitutionally protected liberty interest in being allowed to form a parental relationship with his child).

[141] *See, e.g.*, Mize v. Mize, 621 So.2d 417, 419 (Fla. 1993) (stating the law seeks to assure that the child have frequent and continuing contact with both parents after a divorce).

[142] *See, e.g.*, Taylor v. Taylor, 849 S.W.2d 319, 331 (Tenn. 1993) (noting that a non-custodial parent is not entitled to a finite parenting schedule); *see also* Rosenthal v. Maney, 745 N.E.2d 350, 357–58 (Mass. Ct. App. 2001) (recognizing that a court must realize that after divorce a child's subsequent relationship with both parents can never be the same as before the divorce and that a child's quality of life is provided in large part by the custodial parent).

[143] Long v. Long, 381 N.W.2d 350, 356 (Wis. 1986) (citation omitted).

[144] *See Rosenthal*, 745 N.E.2d at 361.

[145] Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 337 (2008).

consideration for the courts is almost always exclusively based upon what the court determines is in the "best interest" of the child.[146] Even though the best interest of the child is the central issue in custodial parent relocations, there is a divergence among courts and commentators as to whether or not the "best interest of the child" standard constitutes a compelling state interest to interfere with a parent's constitutional rights.

The United States Supreme Court proclaimed it the "highest order" of a state to protect the interest of minor children.[147] Furthermore, several courts and commentators contend that the best interest of the child is a compelling state interest which may infringe upon the fundamental liberties afforded to parents under the Constitution.[148] Specifically, in the context of custodial parent relocation, several courts have found that the best interest of a child is a compelling state interest justifying infringement upon a parent's constitutional right to travel.[149]

However, there are a growing number of courts and commentators who opine that the child's best interest standard is not a compelling state interest that may infringe upon a parent's constitutionally protected rights.[150] One commentator has argued: "The 'best interests' of the child is simply too broad and amorphous a concept to qualify categorically as a compelling state interest."[151] In *In re Ciesluk*, a parental relocation case, the Colorado Supreme Court held that "[s]hort of preventing harm to the child, the standard of 'best interest of the child' is insufficient to serve as a compelling state interest overruling a parent's fundamental rights."[152] The *Ceisluk* court gave the following as a reason for its holding:

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[146] *See, e.g.*, Weaver v. Kelly, 18 S.W.3d 525, 528 (Mo. Ct. App. 2005) ("In determining whether to grant the custodial parent's motion to remove a child from the state, the paramount concern is the best interest of the child.").

[147] Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

[148] *See, e.g.*, *In re* Joseph, 416 N.E.2d 857, 858 (Ind. Ct. App. 1981); McGuire v. Morrison, 964 P.2d 966, 968 (Okla. Civ. App. 1998); Michael v. Hertzler, 900 P.2d 1144, 1148 (Wyo. 1995); Brinig, *supra* note 120, at 1358.

[149] *See* Everett v. Everett, 660 So.2d 599, 601–02 (Ala. Civ. App. 1995); Pollock v. Pollock, 889 P.2d 633, 635 (Ariz. Ct. App. 1995); Bartosz v. Jones, 197 P.3d 310, 322 (Idaho 2008); Carlson v. Carlson, 661 P.2d 833, 836 (Kan. Ct. App. 1983); Braun v. Headey, 750 A.2d 624, 632 (Md. Ct. Spec. App. 2000); Mason v. Coleman, 850 N.E.2d 513, 521 (Mass. 2006); LaChapelle v. Mitten, 607 N.W.2d 151, 164 (Minn. Ct. App. 2001); *In re* Marriage of Cole, 729 P.2d 1276, 1280 (Mont. 1986); *Murnane*, 552 A.2d at 198; Jaramillo v. Jaramillo, 823 P.2d 299, 309 (N.M. 1991); Africano v. Castelli, 837 A.2d 721, 730 (R.I. 2003); Rowsey v. Rowsey, 329 S.E.2d 57, 61 (W. Va. 1985).

[150] *See, e.g.*, *In re Marriage of Ciesluk*, 113 P.3d 135, 144–45 (Colo. 2005); *In re* Parentage of C.A.M.A., 109 P.3d 405, 410 (Wash. 2005); Mizrahi v. Cannon, 867 A.2d 490, 497 (N.J. Super. Ct. App. Div. 2005); LaFrance, *supra* note 7, at 135–47; Meyer, *supra* note 119, at 1490.

[151] Meyer, *supra* note 119, at 1490.

[152] 113 P.3d at 144 (quoting *In re Parentage of C.A.M.A.*, 109 P.3d at 410).

> [F]rom a practical standpoint, adopting the best interests of the child as a compelling state interest to the exclusion of balancing the parents' rights could potentially make divorced parents captives of Colorado. This is because a parent's ability to relocate would become subject to the changing views of social scientists and other experts who hold strong, but conflicting, philosophical positions as to the theoretical "best interests of the child."[153]

Moreover, it is questionable that a court can truly determine what is in a child's best interest with any level of precision. Perhaps the Tennessee Supreme Court put it best, stating that "[t]he goal of facilitating the child's best interest is certainly a noble one, but the notion that courts can ever know with any certainty what will truly be in a given child's best future interest is perhaps unrealistic."[154]

There are strong arguments that the best interests of a child is insufficient as a compelling state interest which may infringe upon a parent's constitutionally protected liberty interests. Nonetheless, upon closer examination, the only reasonable conclusion is that the best interest of children standard is a compelling state interest. Children are our nation's most protected resource, and, thus, protecting the best interests of a child must certainly be a compelling state interest.[155] Certainly, if a custodial parent's move greatly affected the child's physical or mental well-being, there would be a compelling state interest to infringe upon a custodial parent's constitutionally protected right to travel.[156] However, courts must recognize that prohibiting a custodial parent's relocation purely upon the best interest standard "can potentially mean nothing more than a marginal advantage over closely matched alternatives."[157] Thus, in cases involving

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[153] *Id.* at 145; John C. Duncan, Jr., *The Ultimate Best Interests of the Child Enures From Parental Reinforcement: The Journey of Family Integrity*, 83 NEB. L. REV. 1240, 1254 (2005) ("The illusive 'best interest of the child' has become a cliché. Without a concrete legal definition, it has been subject to overuse and misuse. Too often, the 'best interest of the child' is determined by dispassionate third parties relying on empirical data gathered by social scientists."); Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193, 193 (2005).

[154] *Taylor*, 849 S.W.2d at 326.

[155] *See, e.g.*, *Palmore*, 466 U.S. at 433 ("The State, of course, has a duty of the highest order to protect the interests of minor children . . . ."); Lehr v. Robertson, 463 U.S. 248, 257 (1983) ("[T]he rights of the parents are a counterpart to the responsibilities they have assumed [for the minor children]."); Lassiter v. Dep't of Social Servs., 452 U.S. 18, 27 (1981) ("[T]he State has an urgent interest in the welfare of the child . . . ."); Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (holding that when the interests of the parent and the child conflict to the point where the child is threatened with harm, the state has an obligation to protect the welfare of the child).

[156] *See, e.g.*, Dozier v. Dozier, 334 P.2d 957, 959 (Cal. Ct. App. 1959) (prohibiting a change in residence because the medical evidence showing that the child's asthmatic condition would be exacerbated by the proposed move).

[157] Meyer, *supra* note 119, at 1490.

a custodial parent's proposed move, a court must balance the best interests of the child with the custodial parent's right to travel and the non-custodial parent's visitation rights, in determining whether or not the custodial parent can relocate with the child. To do otherwise, is not only unwise, it is a potential violation of the custodial parent's constitutionally protected right to travel.[158]

III. UNCONSTITUTIONAL INFRINGEMENT ON CUSTODIAL PARENT'S RIGHT TO TRAVEL

It is well-recognized that a United States citizen has the right to travel between states.[159] Moreover, this right to travel is a constitutionally protected fundamental right.[160] As a fundamental right, the right to travel interstate can only be restricted in support of a compelling state interest.[161] The only two compelling state interests worthy of restricting a custodial parent's constitutional right to travel are the best interests of the minor child and the non-custodial parent's visitation rights.[162] Furthermore, even if the travel restriction is only placed upon the child, the parent's right to travel is affected because "a legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right altogether."[163] Despite the fact that the United States Supreme Court has repeatedly articulated citizens' constitutionally protected right to travel, trial courts are still reluctant to consider the parent's right to travel in the context of geographical relocations. The legal issues of parental relocation are perpetual, as one in six Americans move at least once every year and the "average American" makes 11.7 moves in a lifetime.[164] As noted by several courts, the simple truth is that mobility is a fact of life.[165] Therefore, it is paramount that the issue of a parent's right to travel is raised in relocation cases, and that such right is balanced with the compelling state interests of the child's best interest and the non-custodial parent's visitation rights.

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[158] Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 499–50 (1990) (stating that the best interest standard, without more, "risks unwise results, stimulates litigation, permits manipulation and abuse, and allows a level of judicial discretion that is difficult to reconcile with an historic commitment to the rule of law").

[159] Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969), *overruled by* Edelman v. Jordan, 415 U.S. 651 (1974).

[160] Saenz v. Roe, 526 U.S. 489, 501–02 (1999).

[161] *Shapiro*, 394 U.S. at 634.

[162] *See supra* Part II.

[163] Jaramillo v. Jaramillo, 823 P.2d 299, 306 (N.M. 1991) (citing *Shapiro*, 394 U.S. at 631).

[164] *In re* Marriage of Ciesluk, 113 P.3d 135, 147 (Colo. 2005) (citations omitted).

[165] *See, e.g.*, *In re* Marriage of Day, 314 N.W.2d 416, 420 (Iowa 1982); *In re* Marriage of Bard, 603 S.W.2d 108, 109 (Mo. Ct. App. 1980); Marez v. Marez, 350 N.W.2d 531, 534 (Neb. 1984).

A custodial parent's request to relocate often means moving hundreds, if not thousands, of miles away from the non-custodial parent.[166] However, there are several cases where the custodial parent wishes to move a much lesser distance from the non-custodial parent. Although the custodial parent's right to travel has not been given as a basis, several courts and state legislatures have enacted rulings and laws indicating that a parent should be allowed to move with the child a small distance away from the non-custodial parent. This is certainly because these judges and legislatures have recognized that the best interest of the child and the non-custodial parent's visitation rights are not substantially affected by relatively minor relocations.[167] For instance, the South Dakota Supreme Court in *Fossum v. Fossum* found that a custodial mother's seventy mile intrastate relocation was not a substantial change of circumstance warranting a modification of custody.[168] The court upheld the well-reasoned proposition of law that "insignificant geographical changes generally will not constitute a substantial change in circumstances."[169] Legislatures in Alabama, Arizona, Iowa, Louisiana, Maine, Michigan, Tennessee, Utah, and Wisconsin have passed laws allowing custodial parents to relocate without permission of the court. These laws usually require the relocation be in-state and within a certain distance from the non-custodial parent's residence, ranging from 60 miles to 150 miles.[170]

In *Curtis v. Curtis*, the custodial mother's proposed move was out-of-state from Fall City, Nebraska, where the father resided, to Big Lake, Missouri.[171] Given the close proximity of the two cities, the proposed out-of-state move only placed the child 17.6 miles away from the non-custodial father.[172] The mother's move to Big Lake would still allow the child "to go to the same school, and [the father's] visitation schedule [would] not change."[173] Furthermore, the mother also volunteered to provide transportation of the child to and from the father's residence, so that the father would not have to drive to Missouri to pick up the child.[174] However, in Nebraska, the threshold question when deciding parental

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[166] *See, e.g.*, Curtis v. Curtis, 759 N.W.2d 269, 273 (Neb. Ct. App. 2008) ("[M]ost removal cases involve the custodial parent asking to move hundreds or thousands of miles away from his or her current location.").

[167] *See* Ericka Domarew, *Michigan Keeps it Within Limits: Relocating No More than "100 Miles"*, 20 T.M. COOLEY L. REV. 547, 563–65 (2003) (stating that Michigan legislators believed a distance of less than 100 miles allowed a non-custodial parent to have access to his or her children).

[168] 545 N.W.2d 828, 832 (S.D. 1996); *see also* Howe v. Howe, 471 N.W.2d 902 (Iowa 1991) (finding that 42-mile move within the state of Iowa could not be a basis for a material change of circumstance warranting the modification of custody).

[169] *Fossum*, 545 N.W.2d at 832.

[170] *See supra* note 6 and accompanying text.

[171] *Curtis*, 759 N.W.2d at 271.

[172] *Id.* at 274.

[173] *Id.* at 272.

[174] *Id.* at 272.

relocation cases is "whether the parent wishing to remove the child from the state has a legitimate reason for leaving."[175] The mother's reason for moving was to live with her long-time boyfriend who was building a new home in Big Lake, a fact which would clearly enhance the living conditions for her and her child.[176] The appellate court noted that Nebraska has never found the desire to live with a boyfriend to be a "legitimate reason" to relocate from the state.[177] The appellate court, in reversing the trial court's decision to allow the move, stated:

> [The trial court] focused on the fact that the move to Missouri is less than 20 miles from Falls City. The short distance does present a unique removal case in that most removal cases involve the custodial parent asking to move hundreds or thousands of miles away from his or her current location. However, no matter the distance involved, we still must apply the well-established law and determine if [the mother] met her burden to demonstrate a legitimate reason for removing [the child] from Nebraska.
>
> Under the circumstances revealed by the evidence in this case, we conclude that [the mother's] desire to continue living with her current boyfriend is not a legitimate reason to remove [the child] from Nebraska.[178]

The Nebraska Court of Appeals never considered the mother's constitutionally protected right to travel when it prohibited her from moving a few miles out of state. Instead, the court relied on the mechanical, judicially created two-part test which first required the mother to prove a legitimate reason to leave the state.[179] In *Curtis*, the father's visitation would have remained the same if the mother had moved 17.6 miles away. There was also no showing of any harm upon the child due to the mother's proposed move of 17.6 miles.[180] Therefore, there was no

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[175] *Id.* at 273 (citing *Farnsworth*, 597 N.W.2d at 592).

[176] *Curtis*, 759 N.W.2d at 273.

[177] *Id.*

[178] *Id.*

[179] Jafari v. Jafari, 284 N.W.2d 554, 555 (Neb. 1979) (announcing for the first time that a custodial parent must have a "legitimate reason" to be allowed to relocate out of the state with minor children). Subsequently, in *Farnsworth*, 597 N.W.2d at 598–601, the Nebraska Supreme Court created the current two-part test that a custodial parent must meet before being allowed to relocate out of the state with the minor children. This test first requires the custodial parent satisfy to the court that he or she has a legitimate reason for leaving the state. *Id.* at 598. If the custodial parent meets this initial threshold, then the custodial parent must also prove that removing the child from Nebraska is in the child's best interest. *Id.* at 599–601.

[180] *Curtis*, 759 N.W.2d at 272. The only evidence the father presented regarding why he did not want the child to relocate was because "all of [the child's] family and friends are in Falls City, as well as her school, and because Falls City is where she was born and has always lived." *Id.*

compelling state interest for the Nebraska Court of Appeals to prohibit the mother from moving and the court's ruling was a clear violation of her constitutionally protected right to travel.

Statutory and judicially created tests, like that found in *Curtis*, require a custodial parent to *first* prove a legitimate reason to relocate *before* analyzing the child's best interest or the effect upon the non-custodial parent's visitation. For instance, in *Curtis*, the Nebraska Court of Appeals summarily dismissed the mother's petition to move 17.6 miles without even analyzing the compelling state interests of protecting the best interest of the child or the non-custodial parent's visitation.[181] Because maintaining the child in the jurisdiction is not a compelling state interest which may infringe upon the parent's right to travel, there is no need for a parent to first prove a "legitimate reason" to move out-of-state.[182] Nebraska, Indiana, New Hampshire, Connecticut, and Massachusetts all have unconstitutional statutory or judicially created tests, which unnecessarily impinge upon the custodial parent's right to travel when analyzing a custodial parent's desire to relocate with the minor children.[183] These tests are unconstitutional because they allow a court to deny the custodial parent's ability to relocate for reasons other than the best interest of the child or the effect of the move on the non-custodial parent's visitation.[184] Simply, a court cannot prohibit a custodial

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[181] *Id.* at 274 ("Because [the mother] failed to satisfy the initial threshold of showing a legitimate reason to move, it is not necessary for this court to determine if it is in [the child's] best interest to move to Missouri with [the mother].").

[182] *See supra* notes 99–118 and accompanying text.

[183] IND. CODE § 31-17-2.2-5 (2008) (stating the best interests of the children are only analyzed after the "relocating individual has [met] the burden of proof that the proposed relocation is made in good faith and for a legitimate reason"); N.H. REV. STAT. ANN. § 461-A:12 (2005) (stating that the parent seeking permission to relocate must first demonstrate by a preponderance of the evidence that the "relocation is for a legitimate purpose" and that the "proposed location is reasonable in light of that purpose" before the trial court focuses on the best interests of the children); Ireland v. Ireland, 717 A.2d 676, 681 (Conn. 1998) (finding that the custodial parent first bears the burden of proving that the move is for a "legitimate purpose" before the best interests of the child regarding the move are analyzed); Rosenthal v. Maney, 745 N.E.2d 350, 358 (Mass. Ct. App. 2001) (the first consideration before allowing a relocation is whether there is a "good reason" for the move); Rosloniec v. Rosloniec, 773 N.W.2d 174, 176 (Neb. Ct. App. 2009) ("In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state."). *But see* Bretherton v. Bretherton, 805 A.2d 766, 775 (Conn. App. Ct. 2002) ("[T]he temptation [is] to end the inquiry when a custodial parent intends to relocate without a legitimate purpose. That procedural stumbling block, however, would thwart the overarching statutory mandate of the best interest of the child.").

[184] *See, e.g.*, Wild v. Wild, 737 N.W.2d 882, 898 (2007) (finding that whether or not the parent has a legitimate reason to leave the state is a "threshold matter for the court to determine prior to evaluating the best interest factor"); Vagts v. Vagts, No. A-02-1055, 2004 WL 235040, at *5 (Neb. Ct. App. Feb. 10, 2004) (not proceeding to conduct a best interest analysis since the trial court found the custodial parent did not have a legitimate reason for seeking to remove the children from the jurisdiction).

parent from relocating and thus infringe upon his or her right to travel without a compelling state interest, with the only two compelling state interests at issue being the best interest of a child and the non-custodial parent's visitation rights.[185] Therefore, requiring a parent to prove a legitimate reason to relocate before other compelling state interests are analyzed is blatantly unconstitutional.

Requiring a compelling state interest to prohibit a custodial parent from relocating with the child, as well as striking down these "legitimate reason" tests, is in harmony with the very purpose of the right to travel. This purpose encompasses the right to "migrate, resettle, find a new job, and start a new life."[186] Consequently, a custodial parent has the constitutional right to move for the simple purpose of wanting to have a new beginning. Such was the case in *Tomasko v. Dubuc*, where the custodial mother wanted to start a new life with her new husband; she purchased a cattle ranch in Montana and requested the court allow her to relocate.[187] However, the Superior Court for the Northern Judicial District of Hillsborough found the mother's desire to start a cattle ranch in Montana was not a "legitimate reason" to the leave the state of New Hampshire with her child.[188] Rulings like these are simply unconstitutional because a parent is only allowed to leave a state if they meet certain pre-determined legitimate reasons for moving, meaning a parent's right to travel may be infringed upon without a compelling state interest.[189]

Opposition to minor parental relocations should be put to an end. This can be achieved by a court balancing a parent's right to travel with the child's best interest and the non-custodial parent's visitation rights. There have been several appellate decisions demonstrating ridiculous attempts to prevent the custodial parent from relocating short distances. For instance, there has been an attempt to prevent the custodial mother from moving the children out of the marital home.[190] In

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[185] *See* Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 253 (1974); *supra* Part II. But see Watt v. Watt, 971 P.2d 608, 614–16 (Wyo. 1999), where the Wyoming Supreme Court went too far by making the right to travel absolute without considering the other compelling state interests of the child's best interest and the non-custodial parent's visitation rights.

[186] *Shapiro*, 394 U.S. at 629, *overruled by* Edelman v. Jordan, 415 U.S. 651 (1974).

[187] 761 A.2d 407, 408 (N.H. 2000).

[188] *Id.* at 410.

[189] *See, e.g.*, *Ireland*, 717 A.2d at 682 (Conn. 1998) (citing examples of legitimate reasons to relocate as being close to family, for health reasons, to protect the safety of the family, to pursue employment or education opportunities, or to be with one's spouse); *Gerber*, 407 N.W.2d at 503 ("Before a court will permit removal of a child from the jurisdiction, generally, a custodial parent must establish that such removal is in the best interests of the child and must demonstrate that departure from the jurisdiction is the reasonably necessary result of the custodial parent's occupation, a factually supported and reasonable expectation of improvement in the career or occupation of the custodial parent, or required by the custodial parent's remarriage.").

[190] Middlekauf v. Middlekauf, 390 A.2d 1202, 1205 (N.J. Super. Ct. App. Div. 1978) (father attempted to restrict the mother and the children to the former marital residence in Wyckoff, New Jersey).

Pennsylvania, a non-custodial father tried to preclude the custodial mother from moving twenty-five miles within the same county.[191] In other states, there are two reported cases of non-custodial fathers suing custodial mothers over relocations of four miles.[192] Finally, there is a reported case in which a non-custodial father attempted to prevent the custodial mother from moving to a location only 3.3 miles further from the father's residence in New Castle, Pennsylvania.[193] In such cases where the geographical distance is not far enough to substantially alter the relationship between the child and the non-custodial parent, the custodial parent's constitutional right to travel should clearly prevail. Furthermore, in these minor relocation cases, the court should also admonish the opposing non-custodial parent by forcing the opposing parent to pay the custodial parent's attorney fees and costs for such an unreasonable opposition to the constitutional move.

CONCLUSION

Absent from a clear majority of courts' analysis in relocation cases is the consideration of the custodial parent's right to travel.[194] However, the United States Supreme Court has clearly recognized a citizen's constitutionally protected right to travel, which includes the right to travel among states in order to "migrate, resettle, find a new job, and start a new life."[195] Citizens do not "check their constitutional rights at the door" the day they become parents, thus, constitutional rights should be considered in relocation cases.[196]

Courts often exclusively decide relocation cases based on the elusive best interest of a child standard.[197] Some of these courts also infuse the "legitimate reason" test in the relocation analysis, usually finding it is a prerequisite that the parent prove by a preponderance of the evidence that the parent has a legitimate reason to leave the state *before* the court will even indulge in best interest of the child analysis.[198] However, courts must recognize they are ill-equipped to determine the best interest of a child with any level of certainty.[199] Courts must also recognize

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[191] Zoccole v. Zoccole, 751 A.2d 248, 249 (Pa. Super. Ct. 2000).

[192] Kellen v. Kellen, 367 N.W.2d 648, 649 (Minn. Ct. App. 1985); Commonwealth *ex rel.* Steiner v. Steiner, 390 A.2d 1326, 1327 (Pa. Super. Ct. 1978).

[193] Slagle v. Slagle, 1 Pa. D. & C.5th 44, 48 (Pa. Com. Pl. 2006).

[194] *See supra* note 15 and accompanying text.

[195] *See supra* notes 17–21 and accompanying text.

[196] *See supra* Part III.

[197] *See supra* note 16 and accompanying text.

[198] *See supra* note 5 and accompanying text.

[199] *See supra* notes 152–56, 159 and accompanying text.

that these "legitimate reason" tests are an unconstitutional infringement upon the custodial parent's right to travel, because keeping the child within the state by itself is not a compelling state interest which may infringe upon the custodial parent's right to travel.[200] By analyzing a custodial parent's right to travel in the context of relocations—recognizing that the only compelling state interests which may infringe upon the parent's right to travel are the best interest of the child and the non-custodial parent's visitation rights—absurd results like that found in *Curtis* would be avoided.[201] Furthermore, by recognizing a custodial parent's right to travel, more certainty would arise in relocation cases because a custodial parent would only be prohibited from relocating upon a showing that the move would either harm the child or substantially alter the relationship between the child and the non-custodial parent.[202]

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[200] *See supra* Parts II(A) and III and accompanying text.

[201] *See supra* Part III.

[202] *See supra* Parts II(B)–(C) and III.