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## Relocation Cases As Change in Custody Proceedings: Judicial Blackmail or Competing Interests Reconciled

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Heil: Relocation Cases As Change in Custody Proceedings: Judicial Black

# RELOCATION CASES AS CHANGE IN CUSTODY PROCEEDINGS: "JUDICIAL BLACKMAIL" OR COMPETING INTERESTS RECONCILED?

## I. INTRODUCTION

Imagine you are a divorced, single mother with custody of two children from your prior marriage. You still live in the same town as your former spouse who has visitation rights. After meeting someone new, you decide to remarry. You want to join your new husband who lives one hundred miles away, but you cannot. Your ex-husband, with the help of the courts, can prevent you from relocating with your children even though you have custody. This exact situation happened to a Missouri mother who was restricted by the courts from moving with her children to her new husband's home in Illinois just ninety-five miles away.<sup>1</sup> The central legal principle at issue in such a case is simple: in divorce situations, a custodial parent may be restricted by law from moving to another state without permission from the court. Such a restriction protects the noncustodial parent's right to continue her relationship with the child.

In our increasingly mobile society, where divorce is more common and more mothers work and remarry,<sup>2</sup> courts have been faced with new relocation challenges and have recently shifted their views concerning the right of the custodial parent to relocate. In 1996, courts in several states abandoned their old standards favoring restrictions on relocation and replaced them with new standards favoring the custodial parent's freedom to relocate.<sup>3</sup>

While courts in states such as California and New York recently recognized that custodial parents should be permitted to move absent a compelling reason not to, a more difficult issue remains: what if both parents have taken an active role in caring for the child? Many noncustodial parents are actively involved with their children after divorce. The South Carolina Supreme Court recently had to address this problem in *Pitt v. Olds*.<sup>4</sup> While the court's reasoning was somewhat unclear, its solution should serve as a model in situations where the noncustodial parent has an interest in the child compelling enough to render relocation without full consideration by a court unfair. In short, when noncustodial parents have played an active role in the

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1. Sarah Downey, *The Moving-Van Wars*, NEWSWEEK, Feb. 28, 2000, at 53.

2. Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L. Q. 305, 310.

3. See, e.g., *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996); *In re Marriage of Francis*, 919 P.2d 776 (Colo. 1996); *Tropea v. Tropea*, 665 N.E.2d 145 (N.Y. 1996); *Aaby v. Strange*, 924 S.W.2d 623 (Tenn. 1996).

4. 333 S.C. 478, 511 S.E.2d 60 (1999).

child's development post-divorce, courts should reopen the custody decision. The burden should shift to the party seeking the change in custody to prove that the change would benefit the child.

South Carolina has been singled out in several discussions as one of the only states with a presumption against relocation.<sup>5</sup> However, since it was established in 1982 in *McAlister v. Patterson*,<sup>6</sup> the presumption has not been applied. This Comment proposes that South Carolina officially abandon the presumption and use *Pitt v. Olds* as a model for relocation cases where both parents are significantly involved with the child. Part II of this Note discusses the competing interests in relocation cases. Part III proposes a standard that would protect the competing interests in these cases. Part IV of this Comment discusses the relevant South Carolina cases, particularly *Pitt v. Olds*, and the irrelevance of the presumption against relocation established in *McAlister*.<sup>7</sup> Part IV also discusses how the decision in *Pitt v. Olds* can serve as a model for relocation cases in other states.

## II. THE COMPETING LEGAL INTERESTS IN RELOCATION CASES

### A. Societal Concerns: The State's Interest in Protecting Children from Emotional or Physical Danger

A child's need for physical and emotional protection does not change simply because a parent plans to relocate. In those rare situations where the relocation itself places a child in danger, this need is of critical importance. A move may also negatively affect a child in more subtle ways, such as changing the social environment for the child or introducing a new, possibly unstable stepparent into the home.

Further, a child may need protection from a custodial parent who is psychologically troubled or who may be too dependent on the child in a way that burdens the child.<sup>8</sup> Such instability may be magnified in an environment where the child has no alternative parental influence close by.

However, relocation can also offer a child in a high-conflict environment a chance to escape parental conflict. It has been shown to be more detrimental for a child to be shuffled between two hostile parents for the sole interest of maintaining contact with both parents than for the child to maintain healthy contact with one parent.<sup>9</sup> Interparental hostility and aggression has been said to be "the single most destructive force in the lives of children whose families

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5. See Chris Ford, *Untying the Relocation Knot: Recent Developments and a Model for Change*, 7 COLUM. J. GENDER & L. 1, 15 (1997); Ann M. Driscoll, *In Search of a Standard: Resolving the Relocation Problem*, 26 HOFSTRA L. REV. 175, 194 (1997).

6. 278 S.C. 481, 299 S.E.2d 322 (1982).

7. 278 S.C. 481, 483, 299 S.E.2d 322, 323 (1982).

8. Wallerstein & Tanke, *supra* note 2, at 319.

9. Edwon J. (Ted) Terry et al., *Relocation: Moving Forward or Moving Backward?*, 15 J. AM. ACAD. MATRIM. LAW. 167, 200-01 (1998).

are going through divorce.”<sup>10</sup> Thus, relocation can actually offer a child in a high conflict environment a chance to escape parental conflict. Although the noncustodial parent’s rights are compromised, the result benefits the child.<sup>11</sup>

Protection of the child’s emotional and physical well-being may also be a reason to deny relocation. Some jurisdictions disallow relocation only in these situations.<sup>12</sup> Examples of parental conduct that could jeopardize the well-being of the child include (1) relocating a child with a serious medical condition to an area where no adequate treatment is readily available, (2) relocating a child with special educational needs to a location without adequate education facilities, or (3) taking up residence with a confirmed child abuser.<sup>13</sup> If the proposed move suggests such bad judgment on the part of the custodial parent that the child will be seriously disadvantaged or harmed, then custody should be changed to the noncustodial parent if the custodial parent relocates.<sup>14</sup> Thus, some states emphasize the harm to the child as the only way a noncustodial parent can gain custody of the child due to the relocation of the custodial parent.

*B. Custody Concerns: The State’s Interest in Having the Best Parent Raise the Child*

When the family unit breaks down as a result of divorce, control of the child shifts to the state.<sup>15</sup> When the state assumes control, it has the power to protect the child.<sup>16</sup> In custody proceedings in which both parents seek sole custody of the child, the state has an interest in providing the best home for the child, regardless of the individual parent’s needs.<sup>17</sup> Thus, the court examines each household and parent to determine which parent should have custody.<sup>18</sup>

Although the court makes the initial custody decision, the eventual noncustodial parent has the right at any time to prove that circumstances have changed enough to warrant reconsideration of custody.<sup>19</sup> If the noncustodial

10. *Id.* at 200.

11. *Id.* at 201.

12. *See, e.g., Aaby v. Strange*, 924 S.W.2d 623, 629-30 (Tenn. 1996); *In re Marriage of Francis*, 919 P.2d 776, 785 (Colo. 1996).

13. *Terry et al.*, *supra* note 9, at 184.

14. *See id.* at 184-85; *Aaby*, 924 S.W.2d at 629.

15. *See* S.C. CODE ANN. § 20-3-160 (Law. Co-op. 1976).

16. *Id.* (“In any action for divorce . . . the court may at any stage of the cause, or from time to time after final judgment, make such orders touching the care, custody, and maintenance of the children of the marriage. . .”).

17. *See* 24A AM. JUR. 2D *Divorce and Separation* § 931 (1998); Gary A. Debele, *A Children’s Rights Approach to Relocation: A Meaningful Best Interests Standard*, 15 J. AM. ACAD. MATRIM. LAW. 75, 102-03 (1998).

18. *Id.*

19. Numerous events can trigger a change in custody proceeding. *See, e.g., Stanton v. Stanton*, 326 S.C. 566, 484 S.E.2d 875 (1997) (granting change in custody to father because mother missed therapy sessions for disabled child); *Fisher v. Miller*, 288 S.C. 576, 344 S.E.2d

parent can prove that circumstances have sufficiently changed to warrant a change in custody, the court will grant the change.<sup>20</sup> This reflects the underlying policy reflected in judicial opinions and statutes that the best interest of the child is of paramount concern.<sup>21</sup>

Whether a custodial parent can easily relocate with her children depends largely upon the state in which she lives.<sup>22</sup> Various jurisdictions have applied relocation standards in numerous ways.<sup>23</sup> Courts maintain these different standards through presumptions and burden shifting.<sup>24</sup> A court favoring the custodial parent, for example, would place the burden on the noncustodial parent to prove that the move is not in the best interest of the child.<sup>25</sup> On the other hand, a court favoring the noncustodial parent would place the burden on the custodial parent to prove that the move is in the best interest of the child.<sup>26</sup>

Requiring courts to hold a change in custody proceeding for relocation cases involving parents who share near equal time with the child initially favors neither parent.<sup>27</sup> Custody proceedings place the burden on the party requesting custody to prove that the change in circumstances is sufficient to warrant a change in custody. These requests include both changes in custody and modifications of custody, such as changes in visitation schedule.

While most relocation cases involve some type of request for a change in the custody agreement, courts often use a very different standard for relocation than the change in circumstances standard required in custody proceedings.<sup>28</sup> In fact, use of change of custody standards in relocation cases has been discouraged in recent years for fear that such proceedings undermine the custodial parent's relationship with the child and create instability in the child's

149 (1986) (denying change in custody to mother, who petitioned court because she remarried and thought she could provide a better home); *Pritchard v. Pritchard*, 262 S.E.2d 836 (N.C. Ct. App. 1980) (holding that trial court did not err in finding material change in circumstances where older son had emotional problems related to younger son, and father had remarried and was able to provide a stable home for younger son).

20. See 24A AM. JUR. 2D *Divorce and Separation* § 991 (1998).

21. Driscoll, *supra* note 5, at 209 ("[E]very jurisdiction at least as a matter of policy, if not expressly, decides custody disputes according to the best interest of the child standard.").

22. For a good discussion of the differences among states, see Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L. Q. 245, 270-303 (1996).

23. See Terry et. al, *supra* note 9 (presenting a discussion throughout the article of the numerous state tests and how they apply).

24. *Id.*

25. See, e.g., *Fortin v. Fortin*, 500 N.W.2d 229, 231 (following South Dakota statute and stating that removal should be permitted if the custodial parent has a legitimate reason for the move).

26. See, e.g., *Rowland v. Kingman*, 629 A.2d 613 (Me. 1993).

27. Several courts already presume that a custodial parent's decision to relocate is a substantial change in circumstances. See, e.g., *House v. House*, 779 P.2d 1204 (Alaska 1989).

28. See, e.g., *Fortin*, 500 N.W.2d at 233 (S.D. 1993) (stating that removal should be permitted so long as the removal would not prejudice the child's rights or welfare).

life because of the constant uncertainty of the custody arrangement.<sup>29</sup> Instead, many courts have adopted the view that custody should not be re-examined unless the noncustodial parent can prove that the move will harm the child.<sup>30</sup>

In relocation cases, a parent can raise the custody issue in several ways. A noncustodial parent can seek a change in the original custody arrangement, alleging that the move is a change of circumstances sufficient to modify the original custody decree.<sup>31</sup> A custodial parent can also request modification of an existing joint custody arrangement in order to seek new visitation schedules or sole custody in place of joint legal custody.<sup>32</sup> As a result of these requests,

29. Those who oppose the use of custody standards in relocation cases argue that custody was determined at divorce, and that the custodial parent should be able to rely on the original custody arrangement without fearing that relocation will mean his or her abilities as custodial parent will be re-evaluated. See Driscoll, *supra* note 5, at 209 (commenting that the "custodial parent should be able to rely on their award of custody without fearing that their decision to relocate will result in a reevaluation of her abilities as the custodial parent."); see also Arthur M. Read, II, *When the Custodial Parent Relocates: Weighing the Best Interests of the Child*, 45 R.I. B.J. 7, 45 (June 1997) (advocating California's approach in *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996), that continued physical possession by the custodial parent is in the child's best interest and prevents the noncustodial parent from using relocation to change a custody order); Wallerstein & Tanke, *supra* note 2, at 318 ("When a child is de facto in the primary residential or physical custody of one parent, that parent should be able to relocate with the child, except in unusual circumstances.").

This issue is accompanied by a strong view among some family law scholars that the child's best interest is to remain with the parent to whom the child has bonded—often known as the "psychological parent." See Henry I. Shanoski, *Two Parents for Every Child of Divorce: Sustaining the Shared Parenting Ideal of Maine's Custody Law*, 14 ME. B. J. 86 (1999). In fact, this is one of the greatest debates about relocation: is it more important for the child to have frequent and meaningful contact with both parents, or is it more important for the child to maintain the closest bond possible with the psychological parent, even when it means sacrificing access to the noncustodial parent? The issue seems virtually irreconcilable. The most notable and cited study on the issue was conducted by Judith Wallerstein and Tony Tanke, who concluded that custody should not be changed unless it is necessary to protect the child. Wallerstein & Tanke, *supra* note 2, at 318.

30. See, e.g., *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996) (holding that relocation is a matter of right and the court only has the power to restrain removal that would prejudice the child). However, states such as Alaska and Idaho consider a move by a custodial parent a change in circumstances. Bruch & Bowermaster, *supra* note 22, at 291-92.

31. See, e.g., *House v. House*, 779 P.2d. 1204 (Alaska 1989) (discussing noncustodial parent's request for change of custody alleging move was a change of circumstances); Gruber v. Gruber, 583 A.2d. 434 (Pa. Super. Ct. 1990) (discussing father's request that court enjoin mother from leaving, or, in the alternative, grant custody to him). In most jurisdictions, a parent seeking a change of custody must prove that a change of circumstances has occurred that warrants modification of the existing custody arrangement. See 24A AM. JUR. 2D *Divorce and Separation* § 991 (1998). There is no set standard applied by courts to determine whether a sufficient change of circumstances has occurred. See *id.* However, courts generally consider the welfare and best interests of the child. *Id.*

32. See, e.g., *In re Marriage of Burgess*, 913 P.2d 473, 486 (Cal. 1996); *Pitt v. Olds*, 333 S.C. 478, 511 S.E.2d 60 (1999); *McAlister v. Patterson*, 278 S.C. 481, 299 S.E.2d 322 (1982). A parent may also seek sole custody from a joint physical custody arrangement, but such a situation has been considered as truly competing with the best interest of the child and is disfavored among courts. See *Terry et al.*, *supra* note 9, at 212.

the court must decide whether it should consider a change in custody or whether it should honor the original custody determination without question.<sup>33</sup>

Despite the 1996 doctrinal shift by many states in favor of the custodial parent's rights,<sup>34</sup> a number of states have recently begun to use variations of their own custody standards to determine whether relocation should be allowed.<sup>35</sup> Although many scholars have advised against using custody standards to determine relocation cases, a strong argument exists, which will be explored throughout this article, that relocation cases which involve shared custody arrangements should be treated as custody cases.

### C. Constitutional Concerns: The Custodial Parent's Freedom

A number of constitutional issues arise when a custodial parent decides to move.<sup>36</sup> Courts most frequently discuss the custodial parent's right to travel freely throughout the United States.<sup>37</sup> While a court ordering a custodial parent to remain in the court's jurisdiction interferes with this right of free travel, such orders are nevertheless common in family courts.<sup>38</sup>

Restrictions on relocation certainly impede the legitimate, perhaps constitutionally protected interest of the custodial parent to travel freely. Jurisdictions can require custodial parents to have a valid reason for the move and can decide which reasons are valid. This power can affect, among other things, the custodial parent's right to remarry by restricting the ability to move to another state to join his or her new spouse. It can also affect the custodial parent's ability to care for the child if a move to another state would provide better access to child care or family, to higher paying jobs, or to public child care programs.<sup>39</sup>

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33. See Bruch & Bowermaster, *supra* note 22, at 280.

34. See *supra* note 3 and accompanying text.

35. See *House v. House*, 779 P.2d 1204, 1207-08 (Alaska 1989) (holding that a custodial parent's decision to leave the state is a per se substantial change in circumstances); *Auge v. Auge*, 334 N.W.2d 393, 396-97 (Minn. 1983) (determining that removal provision should be subject to same constraints as custody modification); *McDonough v. Murphy*, 539 N.W.2d 313, 318-19 (N.D. 1995) (stating that "[b]ecause a motion for change of custody and a counter-motion to change residence of the child are inseparable and intermingled . . . when one of the competing motions is granted, the other is effectively denied."); *Lane v. Schenck*, 614 A.2d 786, 791 (Vt. 1992) (adopting relocation standard that asks whether child is better off with the custodial parent in the new location or the noncustodial parent in the old location).

36. Such concerns include right to travel, right to personhood, privacy, autonomy, home and community, right to maintain close association and frequent contact with the child, right of association, family and marriage, equal protection and discrimination. See Tabitha Sample & Teresa Reiger, *Relocation Standards and Constitutional Considerations*, 10 J. AM. MATRIM. LAW. 229, 230 (1998).

37. *Id.* at 237.

38. See, e.g., *Day v. Day*, 711 So.2d 793 (La. Ct. App. 1998); *Baldwin v. Baldwin*, 710 A.2d 610 (Pa. Super. Ct. 1998); *Pitt v. Olds*, 333 S.C. 478, 511 S.E.2d 60 (1999); *McAlister v. Patterson*, 278 S.C. 481, 299 S.E.2d 322 (1982).

39. See, e.g., *In re Marriage of Burgess*, 913 P.2d 473, 478 (Cal. 1996).

Despite these concerns, court opinions usually do not emphasize or discuss constitutional rights at all.<sup>40</sup> Perhaps this is because, if constitutional rights alone were considered, the custodial parent's interest would completely trump that of the noncustodial parent. When both parents have an equal interest in the child and are equally "fit" parents, the reconciliation of constitutional rights and personal interests is exceptionally difficult.<sup>41</sup>

*D. Visitation Rights: The Noncustodial Parent's Interest in Maintaining a Close Relationship with his or her Child*

Relocation cases arise because noncustodial parents seek to advance their interest in maintaining the visitation rights established in the initial custody arrangement. Relocation interferes with visitation rights to differing degrees,<sup>42</sup> depending on the nature of the custody arrangement, but in all cases, regular contact with the child is replaced with infrequent contact due to distance.

Although a court may impose a new custody arrangement to accommodate for the move, the noncustodial parent usually loses frequent contact with the child. Because the noncustodial parent is often devastated by the results of relocation and society associates frequent contact with both parents as the best situation for the child, some courts have worked hard to protect this interest.<sup>43</sup> However, those who advocate the primary custodian's freedom argue that the child's need for stability and attachment to the primary caregiver should outweigh the noncustodial parent's interest in frequent and continuing contact.<sup>44</sup> Because courts must look at the child's best interest and not that of the parent, noncustodial parents' interests have been overshadowed by new

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40. Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 67 (1995-96).

41. See, e.g., MODEL RELOCATION ACT § 405, cmt. (American Acad. of Matrim. Law. Proposed Draft 1998) ("If the contestants are two competent, caring parents who have had a healthy post-divorce relationship with the child, the competing interests are properly labeled 'compelling and irreconcilable.' . . . In sum, even a perfect list of factors, when applied to decide such a contest, will not resolve the dilemma, i.e., relocation often is a problem seemingly incapable of a satisfactory solution."), available in 15 J. AM. ACAD. MATRIM. LAW. 1, 18-19 (1998).

42. A noncustodial father's interest may be significantly greater in joint legal and joint physical custody cases where the child considers the father a nearly equal parent. While joint custody does not necessarily mean that the father is more involved in the child's life than fathers with mere visitation rights, the father still may share joint rights and duties to make significant decisions affecting the life of the child. See Terry, et al., *supra* note 9, at 211.

43. Wallerstein & Tanke, *supra* note 2, at 311 ("Judges have sometimes applied a seemingly irrebuttable presumption that frequent and continuing access to both parents lies at the core of the child's best interest.")

44. See Bruch & Bowermaster, *supra* note 22, at 264; Debele, *supra* note 17, at 110; Wallerstein & Tanke, *supra* note 2 at 311.



literature indicating that frequent and continuing contact with both parents is not necessary for a child's overall happiness.<sup>45</sup>

The limited amount of psychological literature on relocation of children indicates that less frequent contact with the noncustodial parent does not significantly affect the child's well-being.<sup>46</sup> This does not mean that a child is unaffected by psychological and physical separation from a parent; it only means that frequency of physical contact with both parents after divorce is not an indispensable component of a child's overall happiness and well-being.<sup>47</sup>

Researchers and courts have shown concern that society places too much emphasis on preservation of the predivorce family, which in reality no longer exists.<sup>48</sup> Inevitably, a child will have a different relationship with each parent after a divorce.<sup>49</sup> There must be recognition that the old, predivorce family unit no longer exists. The New York Court of Appeals adopted this notion in *Tropea v. Tropea*<sup>50</sup> when it rejected the relocation standard that had been used by the lower courts:

Like Humpty Dumpty, a family, once broken by divorce, cannot be put back together in precisely the same way. The relationship between the parents and the children is necessarily different after a divorce and, accordingly, it may

45. Judith Wallerstein has compiled the most comprehensive study involving the effects of divorce on the child's development. Her research has been used in numerous articles since it was published in 1996. See Wallerstein & Tanke, *supra* note 2.

However, a contrary view exists that courts should acknowledge divorce as a traumatic event in children's lives that has profound developmental consequences for children in the loss of regular contact with the "non-primary parent". See Shanoski, *supra* note 29, at 87-88. Shanoski calls the "primary caretaker" presumption a "nurturing based test that favors women and deceptively revives the 'tender years' presumption." *Id.* at 90.

46. Wallerstein & Tanke, *supra* note 2, at 311-12.

47. *Id.*

48. See, e.g., *Tropea v. Tropea*, 665 N.E.2d 145, 151 (N.Y. 1996) (noting that it may be unrealistic to preserve the noncustodial parent's close involvement in the children's everyday life at the expense of the custodial parent's efforts to start a new life or to form a new family unit); Wallerstein & Tanke, *supra* note 2, at 314-15 ("Court intervention designed to maintain the geographical proximity of divorced parents is fundamentally at odds with a divorce decision that necessarily determines that each parent will rebuild his or her life separate from the other."); see also Bruch & Bowermaster, *supra* note 22, at 265 (commenting that after divorce, "a new family unit results that deserves protection for many of the same reasons that parents are protected from strangers in other contexts.")

49. Wallerstein & Tanke, *supra* note 2, at 313 (citing ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (Harvard Univ. Press 1992)). Because most divorced fathers have established a substantial relationship with the children before the breakup, it seems logical that the father should have a legal right to maintain some sort of ongoing relationship with the children after the divorce. However, Maccoby and Mnookin also argue that the father should not have the right to maintain the same sort of relationship with the children that he had before the separation because it is simply impossible. *Id.*

50. 665 N.E.2d 145, 151 (N.Y. 1996).

be unrealistic in some cases to try to preserve the noncustodial parent's accustomed close involvement in the children's everyday life at the expense of the custodial parent's efforts to start a new life or to form a new family unit.<sup>51</sup>

Thus, in sole custody situations, even when the noncustodial parent has a strong interest in maintaining contact with the child, a court should allow removal except in extreme circumstances where the move would actually harm the child.

When a joint physical custody arrangement exists, the nonrelocating parent has a stronger argument against relocation. Parents that share joint physical custody of the children have a stronger duty to each other to preserve the child's two-parent environment. The child's sense of normalcy and stability comes from contact with both parents.<sup>52</sup> Thus, in joint custody situations, a relocation may be more harmful to the child than the custodial parent's disappointment upon abandoning a planned move. In these situations, relocation should be seriously scrutinized before it is allowed and may warrant changing custody to the noncustodial parent since the child may be equally bonded with each parent and each is fit to have full custody. In situations where parents have truly shared custody of the child, courts should reconsider custody completely before allowing the primary custodian to move.

Thus, courts should not always minimize the noncustodial parent's interest in maintaining close contact with the child if that interest is connected to the child's interest in family stability. While parental rights should not generally be considered in custody cases, the child's best interest may be linked to the noncustodial parent's involvement in the child's life. When custody has been

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51. *Id.* at 151.

52. Wallerstein & Tanke, *supra* note 2, at 318.

When a dual residency home has been arrived at voluntarily by parents . . . there is an explicit moral and legal assumption that each parent values the role of the other in raising the child. Each parent, therefore, bears equal responsibility for maintaining the child's close relation with both parents to the extent possible. In this situation, stability and continuity favor protection of the child's relationships with both parents because both are, in a real sense, primary to the child's development.

*Id.* at 318. While Wallerstein and Tanke apply this scenario to families with joint physical custody, the same could be held for any shared custody arrangement between parties. Where the father has very frequent visitation with the child and plays a major psychological role in the child's life, he can persuasively argue that the child's needs will be sacrificed with the move. In these situations, separation from either parent is equally traumatic, and relocation should be highly scrutinized. *Id.*

shared between the two parents, or when the child is equally bonded to both parents, courts should not freely allow relocation.

*E. Children's Rights: The Child's Interest in Maintaining the Closest Possible Relationship with the Noncustodial Parent*

The child's interest in maintaining the closest possible relationship with the noncustodial parent is rarely considered in relocation cases.<sup>53</sup> A court's focus on this interest would result in restricting either parent from relocating.<sup>54</sup> While courts have been reluctant to forbid fathers to move, some jurisdictions have ordered both parents to obtain leave of court or provide notice before relocating, particularly in joint custody situations.<sup>55</sup>

Nonetheless, despite an increase in protection of the new post-divorce family (consisting of custodial parent and child), courts have had to reconcile the emphasis on the new post-divorce family with joint custody statutes written in the early 1980s.<sup>56</sup> Increasing attention on the child's relationship with the custodial parent undermines the public policy established in a number of states.<sup>57</sup> In the early 1980s, states began to examine the public policy interest in maintaining the child's contact with both parents, and this translated into the adoption of joint custody statutes in over forty states.<sup>58</sup> Such statutes mirror Texas's legislation, enacted to

assure that children . . . have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child, provide a stable environment for the child, and [to] encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.<sup>59</sup>

Many other jurisdictions have also adopted policies saying that the initial custody determination should be made with an emphasis on the child's contact with both parents.<sup>60</sup>

Relocation issues have forced courts and scholars to re-examine joint custody in light of increasing awareness that parents will not continue to act as

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53. Debele, *supra* note 17, at 102.

54. See Read, *supra* note 29, at 46.

55. See, e.g., Folan v. Folan, 1999 WL 1081341 (Conn. Super. Ct. Nov. 15, 1999); Pitt v. Olds, 327 S.C. 512, 515, 489 S.E.2d 666, 667 (Ct. App. 1999).

56. See June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1112 (stating that joint custody legislation "swept the country" in the 1980s).

57. *Id.*

58. *Id.*

59. TEX. FAM. CODE ANN. § 153.001(a) (West 1995).

60. Carbone, *supra* note 56, at 1112.

a family when one no longer exists.<sup>61</sup> Thus, relocation determinations often in practice contradict the language of the joint custody statutes largely because the new body of literature suggests that frequent and continuing access to both parents does not lie at the core of the child's best interest.<sup>62</sup> However, the two interests can be reconciled. In a situation where the child has been raised under a sole custody arrangement and the father merely has visitation rights, the child's relationship with the custodial parent should be protected and preserved. However, if a functioning shared custody arrangement exists, relocation should be carefully examined under the change in circumstances standards. A *de novo* custody hearing should be conducted and if the change sacrifices the child's stability as it is known through contact with both parents, the move should not be allowed.

Relocation remains such a difficult issue for family courts because of the above mentioned legal interests. Whose interests should courts protect, and whose should they sacrifice for the protection of others? Clearly society has assumed the burden of protecting children from danger. Many states have further encouraged divorced parents to enter into joint custody arrangements. Still, a custodial parent has the constitutional right to live in the state of her choice, yet a noncustodial parent has at least an interest, if not a right, in maintaining a close relationship with the child and in visitation. Clearly some interests must be placed before others to prevent a complete stalemate between the parties. Tipping the scale is difficult without asking a party to make a genuine sacrifice. This problem is exacerbated in shared custody arrangements.

### III. A RECOMMENDED CHANGE TO PROTECT ALL INTERESTS: TREATMENT OF RELOCATION CASES AS CHANGE IN CUSTODY DECISIONS

Relocation is at least as significant as any other change of circumstances warranting a complete custody review. As previously mentioned, a number of courts throughout the United States have begun to use the same standard for relocation cases as they have in change of custody cases.<sup>63</sup> Among the choices afforded courts regarding relocation, the custody approach is by far the most

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61. *Id.* at 1120; Terry et al., *supra* note 9, at 212-13.

62. Wallerstein & Tanke, *supra* note 2, at 311 ("[J]udges have sometimes applied a seemingly irrebuttable presumption that frequent and continuing access to both parents lies at the core of the child's best interest. Therefore, it is important to state very clearly that the cumulative body of social science research on custody *does not* support this presumption.").

63. *See* House v. House, 779 P.2d 1204, 1207-08 (Alaska 1989) (holding that a custodial parent's decision to leave the state is a *per se* substantial change in circumstances); Auge v. Auge, 334 N.W.2d 393, 396-97 (Minn. 1983) (determining that removal provision should be subject to same constraints as custody modification); McDonough v. Murphy, 539 N.W.2d 313, 318-19 (N.D. 1995) (stating that "[b]ecause a motion for change of custody and a countermotion to change residence of the child are inseparable and intermingled . . . when one of the competing motions is granted, the other is effectively denied"); Lane v. Schenck, 614 A.2d 786, 791 (Vt. 1992) (adopting relocation standard that asks whether the child is better off with the custodial parent in the new location or the noncustodial parent in the old location).

neutral. The other options involve presumptions that truly favor one parent over the other. Further, relocation is as justified as any other change in circumstances warranting a complete custody battle. Those who oppose the application of custody standards in relocation cases seem to overlook the fact that a move is almost always a significant change in circumstances for a child in a post-divorce family. Not only is the child moved from a familiar neighborhood, school, and peer community, she is also moved far away from a parent who has played an integral role in her life. Thus, while there is a strong interest in maintaining the relationship between custodial parent and child, reviewing custody does not necessarily have to impede this interest and may be one of the best ways to examine relocation.

Changing custody to the noncustodial parent is not uncommon.<sup>64</sup> However, courts often essentially “blackmail” a custodial parent by ordering them to stay in the area or, in the alternative, relinquish custody to the noncustodial parent.<sup>65</sup> This type of order is not the type proposed by this Note. Rather, the change in custody proceeding proposed here would cure such problems. If a contingent custody order is made by a court, it will only be upon a finding that the noncustodial parent is a fit parent and that the change in circumstances created by the move would not benefit the child. Thus, rather than “blackmailing” the custodial parent, the court provides a viable alternative for the child.

Because custody proceedings afford both parents an opportunity to prove their ability to care for the child, they are a fair way to determine relocation issues in the shared custody setting. The primary custodian would be allowed to move unless the parent seeking the change in custody can prove that a change in custody will benefit the child. Thus, the burden is placed on the party seeking the change in custody rather than on the custodial or noncustodial parent. A noncustodial parent who wishes to block the move has an opportunity to show that the child will benefit from remaining in the town where the custodial parent resides. The child, who has an interest both in stability and in maintaining contact with both parents, will benefit from the reassessment because the custody decision will focus on the child’s best interest under all of the circumstances, including maintenance of the existing custodial arrangement. Finally, the state’s interest in the child’s physical and emotional well-being will be advanced because the court will assess each parent and household carefully, resulting in a closer look at the effect of the move on the child.

In relocation cases where custody is not sought by the noncustodial parent, courts should use their own relocation standards already in place to determine the child’s best interest. While these standards may favor one parent over another, they should not involve custody issues, but rather a determination that considers the custodial parent’s right to move. In these cases, unless the move

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64. Bruch & Bowermaster, *supra* note 22, at 260-61.

65. *Id.*

will harm the child, the move should be allowed because the only alternative is to prohibit the move which may be unreasonable, unfair, and unconstitutional.

While the change in custody standard has been employed in other states and has been criticized by family law advocates,<sup>66</sup> it should be re-examined for its merits rather than dismissed for its minor, if not illusory, affect on the child's stability. In fact, the custody standard would alleviate the problem among states concerning the need for a uniform relocation standard. While change in custody decisions involve differing criteria concerning custodial fitness, the application of the standard guarantees that each household will be reassessed before the parent is allowed to move with the child. This alleviates a number of problems caused by relocation standards. First, it eliminates the need for a presumption for or against relocation. When a noncustodial parent challenges a proposed move, the move is automatically categorized as a change in circumstances, guaranteeing a reassessment of custody. Second, it eliminates arbitrary court decisions that grant custody to a noncustodial parent simply to prevent the custodial parent from moving.<sup>67</sup> Thus, if a transfer of custody to the noncustodial parent is not in the child's best interest, the custodial parent will be allowed to move. Third, the standard provides a fair solution for parents in joint legal and physical custody arrangements where each parent has a substantial interest in the child.<sup>68</sup> If the court weighed the circumstances of the move against a change in custody to the other parent, the child may truly be better off with the other parent, and a change in custody would give weight to each parent's rights to the child.

#### IV. SOUTH CAROLINA'S APPROACH: A MODEL FOR RELOCATION?

##### A. *A Presumption Against Relocation?*

In *McAlister v. Patterson*,<sup>69</sup> the South Carolina Supreme Court established a presumption against relocation requiring the custodial parent to prove that relocation is in the best interest of the child.<sup>70</sup> While South Carolina is one of only a few states with a presumption against relocation,<sup>71</sup> the court of appeals

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66. Bruch & Bowermaster, *supra* note 22, at 260-62; Wallerstein & Tanke, *supra* note 2, at 318.

67. Such practice by the courts has been called "a kind of unseemly judicial blackmail," and has been harshly criticized. See Bruch & Bowermaster, *supra* note 22, at 261.

68. Cf. MODEL RELOCATION ACT § 405, cmt. (American Acad. Matrim. Law. Proposed Draft 1998) ("If the contestants are two competent, caring parents who have had a healthy post-divorce relationship with the child, the competing interests are properly labeled 'compelling and irreconcilable' . . . In sum, even a perfect list of factors, when applied to decide such a contest, will not resolve the dilemma, i.e., relocation often is a problem seemingly incapable of a satisfactory solution.").

69. *McAlister v. Patterson*, 278 S.C. 481, 299 S.E.2d 322 (1982).

70. *Id.* at 483, 299 S.E.2d at 323.

71. Driscoll, *supra* note 5, at 194.

has not applied the presumption to any relocation case since it was established in 1982.<sup>72</sup> Likewise, the supreme court has not applied the presumption to prohibit relocation since it established the presumption in *McAlister*.<sup>73</sup> The supreme court did not decide any relocation cases between 1992 and 1998, although it denied certiorari in at least two cases.<sup>74</sup> When the supreme court again addressed relocation in *Pitt v. Olds*,<sup>75</sup> it did not discuss the implications of *McAlister*.<sup>76</sup> The supreme court also did not discuss the status of the presumption, despite the court of appeals's historical disregard of the presumption.<sup>77</sup>

The court's decision to exclude *McAlister* from its discussion reinforces the appearance that the presumption carries little weight in any relocation determination. The exclusion of *McAlister* from all of the major relocation cases decided by the South Carolina Court of Appeals further indicates that the presumption is irrelevant. Given the interests discussed in this Comment, the court of appeals's decisions in other relocation cases, the parties involved, and the trial record, *Pitt* was properly decided as a change of custody case and is consistent with other South Carolina decisions concerning relocation.

#### B. *McAlister v. Patterson: The Establishment of a Meaningless Presumption*

In *McAlister*, the father sought to prevent the mother from moving with her second husband to Washington, D.C.<sup>78</sup> Custody of the minor child was vested in the mother, and the father petitioned the family court for an order restraining the mother from removing their son from Laurens, where the parties resided.<sup>79</sup> The father had given property to the mother in exchange for her agreement not to move the child from Laurens.<sup>80</sup>

The family court found that both parents were fit parents and the child's best interests would be advanced by his remaining in Laurens County; therefore, it ordered that the mother either remain in Laurens County or

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72. See *Eckstein v. Eckstein*, 306 S.C. 167, 410 S.E.2d 578 (1991); *Hengeller v. Hanson*, 333 S.C. 598, 510 S.E.2d 722 (Ct. App. 1998); *VanName v. VanName*, 308 S.C. 516, 419 S.E.2d 373 (Ct. App. 1992).

73. *Id.* Even in *McAlister*, it appears that other factors were more significant than the presumption.

74. See *VanName v. VanName*, 308 S.C. 516, 419 S.E.2d 373 (Ct. App. 1992); *Hengeller v. Hanson*, 333 S.C. 598, 510 S.E.2d 722 (Ct. App. 1998).

75. *Pitt v. Olds*, 333 S.C. 478, 511 S.E.2d 60 (1999).

76. *Id.* at 482 n.2, 511 S.E.2d at 62 n.2.

77. *Id.* "In light of our holding that Mother failed to show changed circumstances warranting modification of the custody decree, we need not address the implications of our opinion in *McAlister v. Patterson*." *Id.* (citation omitted).

78. *McAlister v. Patterson*, 278 S.C. 481, 482, 299 S.E.2d 322, 323 (1982).

79. *Id.* at 482, 299 S.E.2d at 322.

80. The mother received property worth over \$250,000 in exchange for remaining in Laurens, South Carolina until the son turned eighteen. *Id.* at 482, 299 S.E.2d at 323.

relinquish custody to the father.<sup>81</sup> The court indicated that it was influenced by the child's close relationship with the father and the number of relatives in the area who could serve as a support network for the child.<sup>82</sup> The supreme court upheld the trial court, agreeing that the child's interests would be best served by remaining in a familiar environment among friends and relatives.<sup>83</sup>

The supreme court created a presumption against relocation,<sup>84</sup> stating that a parent seeking to relocate has the burden of proving that a move would serve the best interests of the child.<sup>85</sup> This ruling favored noncustodial parents, who had to prove nothing under the presumption unless the custodial parent could prove that the move would benefit the child.<sup>86</sup>

The court's ruling was in keeping with the more prominent view in the early 1980s that children were best served by contact with two parents.<sup>87</sup> However, the trial court placed a significant emphasis on the child's relationship with the father while minimizing the child's relationship with the mother.<sup>88</sup> A brief examination of the interests advanced in the opinion shows that under more recent standards, the mother in *McAlister* probably would have been permitted to move.

In *McAlister*, because the mother had sole custody and the father did not request a change of custody,<sup>89</sup> the court could have emphasized the child's need for stability over the child's interest in maintaining close contact with both

81. *Id.* at 481, 299 S.E.2d at 322.

82. *Id.* at 483, 299 S.E.2d at 323.

83. *Id.* at 483-84, 299 S.E.2d at 323-24.

84. *Id.* at 483, 299 S.E.2d at 323. ("As a rule, the presumption is against removal of the child. In situations where removal will benefit the child, removal has been allowed." (citations omitted)). The court cited *Koon v. Koon*, a South Carolina case from the 1940s that discussed a transfer of custody from the grandparents to the father and did not clearly establish a presumption against removal. *McAlister*, 278 S.C. at 483, 299 S.E.2d at 322. The *Koon* court found that it was against the child's well-being to move him from a familiar environment with his grandparents into a foreign one "among strangers" to live with his father, but the opinion does not specifically say that a presumption exists against removal. *Koon*, 203 S.C. at 562, 28 S.E.2d at 91. Instead the court emphasizes that the child's best interests and not those of the parents are of primary concern. *Id.* at 560, 28 S.E.2d at 90. The facts were sufficiently different from *McAlister* that the court was not bound by the ruling, indicating the court's specific intention to establish the presumption against relocation. *McAlister*, 278 S.C. at 483, 299 S.E.2d at 323.

85. *Id.* at 482, 299 S.E.2d at 323.

86. *Id.*

87. Interestingly, the South Carolina Supreme Court strongly disfavored joint custody at the time (contrary to the rest of the country). See *Woodall v. Woodall*, 322 S.C. 7, 471 S.E.2d 154 (1986) (noting that "joint custody is presumed to be harmful and not conducive to the best interest of the child," *Id.* at 12, 471 S.E.2d at 157, and that "visitation that is analogous to divided custody is to be avoided," *Id.*, 471 S.E.2d at 458, and "it would not be conducive to the best interests and welfare of [the child] to be shifted and shuttled back and forth for alternate brief periods of time," *Id.* at 13, 471 S.E.2d at 458). The South Carolina legislature only recently gave the family courts the authority to grant joint custody. See S.C.CODE ANN. § 20-7-420(42) (Law. Co-op Supp. 1996).

88. *McAlister*, at 482, 299 S.E.2d at 322-23.

89. *Id.* at 482, 299 S.E.2d at 322.



parents. Moreover, the court could have easily concluded that the child should remain in Laurens without establishing a presumption against relocation. Because the trial court had reviewed the facts of the case, the supreme court could have easily deferred any discretion to the trial judge without comment on any presumption against relocation. Further, the court left no guidance regarding the presumption's affect on subsequent holdings, thereby leaving an extremely narrow window for decisions favoring the custodial parent.

C. Hengeller v. Hanson *and* VanName v. VanName: *Consistency with Pitt v. Olds*

1. VanName v. VanName

In *VanName v. VanName*,<sup>90</sup> the court of appeals treated the case as a custody decision and disregarded *McAlister*'s presumption against relocation.<sup>91</sup> The court of appeals upheld the trial court's decision to continue the mother's primary custody of the children after examining the circumstances under which the children would live with each parent.<sup>92</sup>

After the couple's divorce, primary custody of the minor children was granted to the mother.<sup>93</sup> The divorce decree contemplated that the mother would move from Greenville.<sup>94</sup> When the mother sought to move to northern Virginia, the father sued for a change of custody.<sup>95</sup> In upholding the trial court's decision, the court of appeals reexamined the conditions under which the children would live if custody were continued with the mother or changed to the father.<sup>96</sup> The court concluded that "[a]lthough the move is a change of circumstances it does not significantly affect the well being and overall interest of the minor children," and "[s]tanding alone it does not form a basis for transfer of custody."<sup>97</sup> Thus, although the move was seen by the court as a change in circumstances, the change would not adversely affect the children and therefore the custodial parent was allowed to move.

In contemplating the circumstances under each household, the court of appeals used a change in custody standard even when the mother had sole custody of the children.<sup>98</sup> The court of appeals first considered whether a change of circumstances had been shown such as to warrant a change in

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90. 308 S.C. 516, 419 S.E.2d 373 (Ct. App. 1992).

91. *Id.* at 519, 419 S.E.2d at 374.

92. *Id.* at 518, 419 S.E.2d at 374.

93. *Id.* at 517, 419 S.E.2d at 373.

94. *Id.* at 517, 419 S.E.2d at 373. The acknowledgment in the divorce decree that the mother may have to move was a major factor in the decision to allow the mother to relocate. *Id.* at 519, 419 S.E.2d at 375.

95. *Id.* at 517, 419 S.E.2d at 373.

96. *Id.* at 518, 419 S.E.2d at 374.

97. *Id.* at 519, 419 S.E.2d at 375.

98. *Id.* at 519, 419 S.E.2d at 374.

custody.<sup>99</sup> It then considered whether the mother should be ordered to return to Greenville in order to make custody more convenient for the father.<sup>100</sup> After weighing both interests, the court concluded that the move should be allowed.<sup>101</sup> The court disregarded the presumption against relocation.<sup>102</sup>

In *VanName*, the mother had been granted a divorce on the grounds of adultery, and was originally granted sole custody of the child. Despite the mother's status as sole custodian and the father's misdeeds, the court proceeded with a reexamination of custody.<sup>103</sup> As a result, the children's best interests were protected because the court reviewed the fitness of each parent.

The supreme court denied certiorari, indicating that the court of appeals's decision did not merit review. Thus, the court of appeals's failure to apply the *McAlister* presumption was not inappropriate enough to warrant review.

## 2. Hengeller v. Hanson

In *Hengeller v. Hanson*,<sup>104</sup> the parents had joint legal custody of two adopted children, with primary custody vested in the mother.<sup>105</sup> The trial record indicated that the mother had made every effort to "integrate [the father] into the children's lives."<sup>106</sup> The father filed for a change of custody when the mother accepted a job in Florida because her position at the Medical University of South Carolina was terminated.<sup>107</sup> The parties' divorce decree included an acknowledgment that the mother would possibly have to accept employment in another state and gave the mother the authority to relocate the children out of state if necessary.<sup>108</sup> The family court left the mother as primary custodian and allowed the move.<sup>109</sup>

Noting that "custody decisions are left largely to the discretion of the trial court,"<sup>110</sup> and that the moving party must show that the best interest of the child will be served by the change in custody,<sup>111</sup> the court of appeals determined that

99. *Id.* at 519, 419 S.E.2d at 374.

100. *Id.* at 519, 419 S.E.2d at 374.

101. *Id.* at 520, 419 S.E.2d at 375.

102. "While it is true that the court may, as in the case of *McAlister v. Patterson*. . . require a parent to live in a particular area, that authority should be exercised sparingly. . . Forcing a person to live in a particular area encroaches upon the liberty of an individual to live in the place of his or her choice." *Id.* at 519, 419 S.E.2d at 374.

103. *Id.* at 518, 419 S.E.2d at 374.

104. 333 S.C. 598, 510 S.E.2d 722 (Ct. App. 1998).

105. *Id.* at 600, 510 S.E.2d at 724.

106. *Id.* at 600, 510 S.E.2d at 725.

107. *Id.* at 600, 510 S.E.2d at 724.

108. *Id.* As in *VanName*, the contemplation of the move was a major factor in the court's assessment of custody.

109. *Id.* at 600, 510 S.E.2d at 724-25.

110. *Id.* at 600, 510 S.E.2d at 724 (citing *Baer v. Baer*, 282 S.C. 362, 318 S.E.2d 582 (Ct. App. 1984)).

111. *Id.*

the change prompted by the move was not significant enough to warrant a change in custody.<sup>112</sup> This determination is consistent with the standard proposed in this Note: in situations where both parents have maintained significant contact with the child, the party seeking the change in custody should prove that the change will benefit the child. The court of appeals reviewed the trial record and determined that the appropriate factors had been considered in allowing the mother to relocate with the children.<sup>113</sup>

The court of appeals treated *Hengeller* as a change in custody case and examined the trial court's treatment of the issue.<sup>114</sup> In concluding that custody should remain with the mother, the court noted that the trial court had properly weighed the consequences of the move against a change in primary custody to the father.<sup>115</sup> The court also discounted the applicability of *McAlister*, stating that "courts have applied the presumption against removal cautiously" and "a parent may not be denied custody solely on the basis of a move to another state."<sup>116</sup>

#### *D. Pitt v. Olds: A Relocation Case Properly Decided as a Change in Custody Case*

The South Carolina Supreme Court's brief opinion in *Pitt v. Olds*<sup>117</sup> is somewhat confusing. However, the trial record and the court of appeals's opinion both clarify the supreme court's position that the case was properly decided by the family court as a change in custody case.<sup>118</sup> The pleadings indicate that the mother sought a modification of the existing joint custody arrangement in order to change the father's visitation to a solid block of visitation in the summer in order to facilitate the mother's original request to move to Arizona.<sup>119</sup> Under South Carolina law, when a party seeks to alter a joint custody arrangement, that party has the burden of establishing a material change of circumstances substantially affecting the child's welfare, as in any other change in custody case.<sup>120</sup> Thus, the mother's request to alter the

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112. *Id.* at 601, 510 S.E.2d at 726 (noting that a parent may not be denied custody solely on the basis of a move to another state).

113. *Id.* at 601, 510 S.E.2d at 725.

114. *Id.* at 601, 510 S.E.2d at 725.

115. The court listed some of the factors considered by the trial court, including that "Hanson was the children's primary caregiver since their infancy" and that "a change in custody would completely isolate the children from Hanson." *Id.* at 601, 510 S.E.2d at 725. The court also placed great weight on the agreement between the parties and that the mother had made "every effort to obtain suitable employment in South Carolina." *Id.* at 601, 510 S.E.2d at 726.

116. *Id.* at 601, 510 S.E.2d at 726.

117. 333 S.C. 478, 511 S.E.2d 60 (1999).

118. *Id.* at 480, 511 S.E.2d at 61.

119. *Pitt v. Olds*, 327 S.C. 512, 517, 489 S.E.2d 666, 668-69 (Ct. App. 1997), *rev'd*, 333 S.C. 478, 511 S.E.2d 60 (1999).

120. *Dixon v. Dixon*, 336 S.C. 260, 519 S.E.2d 357 (Ct. App. 1999); *Allison v. Eudy*, 330 S.C. 427, 499 S.E.2d 227 (Ct. App. 1998).

visitation schedule in *Pitt* carried the same burden as if the mother had sought a change in custody.<sup>121</sup>

*Pitts v. Olds* arose after the parties' 1991 divorce.<sup>122</sup> The divorce decree granted them joint legal custody of their three-year old daughter, Ashton, with the mother having primary custody, and the father having secondary custody and liberal visitation.<sup>123</sup> The trial court found that the father had exercised nearly one hundred percent of his court-ordered visitation and was otherwise actively involved in the child's life.<sup>124</sup> The court found his extensive involvement was "more so than the usual case of a noncustodial parent."<sup>125</sup> This type of involvement is tantamount to a shared custody arrangement of the type that should be subject to a change in custody review. The father's involvement indicated that the parties were under a shared custody arrangement by agreement which should create a greater interest in the father's right to visitation.

In 1993, the parties consented to a family court order enjoining either of them from permanently moving with Ashton outside of South Carolina without first obtaining permission from the court.<sup>126</sup> A year later, the mother remarried and petitioned the family court to move with Ashton to Arizona, where the mother's new spouse resided.<sup>127</sup> Olds counterclaimed, seeking, among other things, sole custody of Ashton.<sup>128</sup> The mother later amended her complaint, seeking modification of the custody decree to allow for the move.<sup>129</sup> The family court ruled that it would be adverse to Ashton's best interest to be "removed from her family and friends, familiar surroundings, and her father here in South Carolina to . . . Phoenix, Arizona where she would be essentially a stranger and not have the necessary support network . . ."<sup>130</sup> The family court then continued the parties' joint custody arrangement with the mother as primary custodian, so long as she established permanent residency in the geographical area.<sup>131</sup> In the alternative, the father would become primary custodian.<sup>132</sup>

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121. *Pitt*, 333 S.C. at 481, 511 S.E.2d at 61.

122. *Id.* at 480, 511 S.E.2d at 61.

123. *Id.* at 480, 511 S.E.2d at 61.

124. *Pitt v. Olds*, No. 91-DR-08-39, at 5-9 (Sept. 20, 1991) (Order of the Hon. Judy C. Bridges). The order gave the father visitation with the child on alternating weekends, midweek, and on all holidays for alternating years.

125. *Pitt v. Olds*, No. 91-DR-10-2483, at 3 (Oct. 25, 1994).

126. *Pitt*, 333 S.C. at 480, 511 S.E.2d at 61.

127. *Id.* at 480, 511 S.E.2d at 61.

128. *Pitt v. Olds*, 327 S.C. 512, 515, 489 S.E.2d 666, 667 (Ct. App. 1997), *rev'd*, 333 S.C. 478, 511 S.E.2d 60 (1999).

129. *Id.* at 517, 489 S.E.2d at 669.

130. *Pitt*, 333 S.C. at 480, 511 S.E.2d at 61.

131. *Id.* at 480, 511 S.E.2d at 61.

132. *Id.* at 480, 511 S.E.2d at 61. The father also sought child support, attorney's fees and costs, which will not be discussed here, but which the Court of Appeals also considered. *See Pitt*, 327 S.C. at 521, 489 S.E.2d at 671.

When the mother sought “permission” to move, she had already moved herself and the child to Phoenix without first obtaining leave of court, which violated the court’s 1993 order.<sup>133</sup> The trial court found this to be “extremely poor judgment on the part of the mother.”<sup>134</sup> The trial court also found that the mother tainted the child’s perception of the move to Arizona by promising that a swimming pool, new puppy, and horses awaited her in Arizona.<sup>135</sup>

In addition to the mother’s poor judgment, her new husband’s ability to maintain a stable family environment was questionable. Pitt was forty-nine and the mother was twenty-three.<sup>136</sup> The mother was Pitt’s third wife, and Pitt was responsible at the time for \$833 per month in child support to his second wife.<sup>137</sup> Pitt had worked a “myriad of jobs which [took] him all over the United States and even out of the country to Saudi Arabia, not being in any one location for a significant period of time” and “made no effort to obtain employment in South Carolina, or even in the Southeast despite apparently possessing transferable skills.”<sup>138</sup> Pitt testified that he earned an income in excess of \$60,000 per year as a self-employed consultant that would allow him to make his prior child support payments and allow his new wife to stay at home with the child.<sup>139</sup> Pitt’s second wife testified that he had previously attempted the same consulting business during past periods of unemployment and was largely unsuccessful.<sup>140</sup> Pitt was found by the court to possess \$37,800 in credit card debt, yet he planned to pay child support to his second wife, allow his current wife to stay at home with the child, and pay for the child’s plane tickets to South Carolina.<sup>141</sup> Pitt’s second wife, who was found to be a credible witness, testified that she and George Pitt used marijuana frequently up until the time of separation.<sup>142</sup> She also testified that Pitt induced her to write a fraudulent letter to a financial institution “misrepresenting his responsibility

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133. Pitt v. Olds, No. 91-DR-08-39, at 3 (Sept. 20, 1991) The judge held:

I find that the Plaintiff and her new husband have already moved to Phoenix, Arizona, and have effectively moved the minor child as well, in that all of her personal effects have been moved, which move flies in the face of this Court’s previous order. This court specifically finds it to be extremely poor judgment on the part of the mother for making such a drastic and permanent move without first obtaining leave of the Court to do so as required by my previous order, as opposed to making the move and then seeking the Court’s endorsement of the same.

134. *Id.* at 3.

135. *Id.*

136. *Id.*

137. *Id.* at 4.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 5-6.

142. *Id.* at 6.

for certain credit card debts in their decree in order to receive more favorable consideration on his loan application.”<sup>143</sup>

Despite these concerns, the court found the child’s father to be in a stable marriage but with an insufficient income to support his desire to visit with the child on a frequent basis.<sup>144</sup> The court also found “no negative evidence” that would give the court “any concern about the Defendant’s new wife as a step parent.”<sup>145</sup> Further, the court found that the father lived in the former marital home, where the child grew up, and that a large extended family network on both the paternal and maternal side existed in the Tri-County area.<sup>146</sup> The maternal grandmother had been providing primary care for the child for a “substantial portion of her life on at least a five day per week basis.”<sup>147</sup>

The family court ultimately found that the custody agreement should not be modified to change the visitation arrangement and that custody should be transferred to the father if the mother chose not to return to South Carolina.<sup>148</sup> The court of appeals upheld the court’s decision to leave primary custody with the mother, but reversed on the removal issue, holding that “a decision to remarry is a legitimate reason for which to seek a child’s removal from the state.”<sup>149</sup> The court found that the close relationship between Ashton and her mother, coupled with the mother’s good faith effort to foster Ashton’s relationship with her father and the legitimate reason for the move warranted relocation of the child with her mother, and a denial of the father’s petition for sole custody.<sup>150</sup>

In light of the facts of this case, the competing interests in relocation cases, the South Carolina Supreme Court’s prior denials of certiorari, and case law from other states, *Pitt* was correctly decided as a case in which relocation justified both an examination of the child’s interest in stability of the relationship with both parents and the application of change in custody standards. Although the court did not anticipate the interests that were being weighed in its opinion, *Pitt* should be regarded as a model for relocation decisions where the relationship of both with the child is so close that a

143. *Id.* at 7.

144. *Id.* at 7-8.

145. *Id.* at 8.

146. *Id.* at 8. Both sets of grandparents resided in Berkeley County, South Carolina. The father’s great-grandmother, brother, aunts, uncles and cousins all reside in the Tri-County area. The child was the only grandchild of both sets of grandparents. *Id.*

147. *Id.* at 9.

148. *Id.* at 14. (“I find . . . that the parties should continue with the joint custodial provisions of the previous order . . . but that if the Plaintiff fails to establish permanent residency in the geographical area . . . within a reasonable period of time, then the Defendant shall forthwith become the primary custodian. . .”).

149. *Pitt v. Olds*, 327 S.C. 512, 520, 489 S.E.2d 666, 670 (Ct. App. 1997), *rev’d*, 333 S.C. 478, 511 S.E.2d 60 (1999) (citing *Gancas v. Schultz*, 683 A.2d 1207, 1209 (Pa. Super. Ct. 1996); *Aaby v. Strange*, 924 S.W.2d 623, 624 (Tenn. 1996).

150. *Pitt*, 327 S.C. at 520, 489 S.E.2d at 670.

legitimate question exists as to which relationship should be sacrificed if one parent decides to relocate with the child.

1. *Custody Concerns: The State's Interest in Having the Best Parent Raise the Child*<sup>151</sup>

In shared custody cases, where both parents have been actively involved in the child's life, the child's best interest is unclear. Protecting the child's relationship with the primary custodian may be insufficient in cases where a child is accustomed to contact with both parents. The court of appeals in *Pitt* focused on the child's relationship with the primary custodian.<sup>152</sup> However, the record indicates that the child was close to both parents.<sup>153</sup> The court of appeals reversed the trial court's decision to disallow the move based on three factors: (1) the "pressing need" for the move (that the mother join her husband in the state in which he has resided for many years), (2) the mother's promise to exercise good faith in continuing the child's relationship with the father, and (3) the mother's close relationship with the child.<sup>154</sup> Further, the court of appeals limited the presumption against relocation, largely in keeping with modern protection of the new, post-divorce family.<sup>155</sup>

However, the court of appeals ignored a crucial aspect of the *Pitt* case that was actually outcome determinative. Until the relocation issue arose, the parents shared joint legal custody of the child, and the father was very involved in Ashton's life.<sup>156</sup> The mother sought to modify the existing custody arrangement which required her to prove that the move was a change in circumstances significant enough to warrant modification of the existing custody decree, thereby reopening the custody issue.<sup>157</sup> The court of appeals did not require this showing; nor did it consider the parties' joint custody arrangement.<sup>158</sup>

151. See Debele, *supra* note 17, at 102. When the family unit breaks down as a result of divorce or adoption, control shifts to the state. When state assumes control, it has the power to protect the child. *Id.*

152. The court of appeals commented, "[t]here is no question but that Father has been actively involved in Ashton's life. There is also no question, however, that Mother has been the primary custodial parent at least since the parties' initial agreement was approved in August of 1991." *Pitt*, 327 S.C. at 520, 489 S.E.2d at 670.

153. *Pitt*, Order of Oct. 25, 1994, at 9 ("I find that the minor child is happy, healthy, well adjusted and enjoys a close relationship with both parents.").

154. *Pitt*, 327 S.C. at 520, 489 S.E.2d at 670.

155. Wallerstein & Tanke, *supra* note 2, at 318.

156. *Pitt*, 327 S.C. at 515-16, 489 S.E.2d at 667-68.

157. *Pitt v. Olds*, 333 S.C. 478, 481, 511 S.E.2d 60, 61 (1999) ("In order for a court to modify an existing custody decree, there must be a showing of changed circumstances occurring subsequent to the entry of the decree.").

158. The Court of Appeals did acknowledge the father's active interest in the child's life, but focused on the mother's role as primary custodian instead. *Pitt*, 327 S.C. at 520, 489 S.E.2d at 670.

Because the court considered the move to be a sufficient change in circumstances to warrant reconsideration of custody, the issue became who the child should live with if the mother decided to move. The trial court found that the move was not in the child's best interest.<sup>159</sup> The supreme court further found that the mother's remarriage alone was not a sufficient change of circumstances to modify the existing divorce decree.<sup>160</sup> In other words, the mother's remarriage was not enough to prove that the child's best interest would be served by the change in circumstances created by the move to Arizona. An examination of each parent showed that the father's household would actually be a better environment for the child if the mother chose to move to Arizona.<sup>161</sup> Thus, the state's and the child's interest in stability and placing the child in the best household outweighed the interest in protecting the post-divorce family typically known as the custodial parent and the child.

## 2. *Visitation Rights: The Father's Interest in Maintaining a Close Relationship*

The post-divorce family in *Pitt* consisted of the entire predivorce family because of the joint custody arrangement. Since the most important interest, according to recent studies, is in the child's stability, the court of appeals should have denied relocation to the mother or alternatively ruled that custody should be transferred to the father.<sup>162</sup> In joint custody cases, the child associates stability with both parents, not just one.<sup>163</sup> Following this exception to the modern "rule" that the post-divorce family should be protected, the court in *Pitt* correctly ruled that the child should have remained in South Carolina in order to protect her interest in stability.

Further, the child's interest is protected in *Pitt* by her extended family's presence in South Carolina. While this is sometimes a factor minimized by the court, it was a significant factor in *Pitt* because Arizona had no protective community to offer the child. The trial record indicated that the child had no family or friends to look out for her in Arizona, and the Guardian ad litem in the case expressed great concern over this fact.<sup>164</sup>

The court of appeals's decision illustrates the harm in applying the modern doctrine to every case. The post-divorce family here is not necessarily the mother and the child because the child spent almost equal time with the father, and he resides in the town and the house in which she grew up among relatives, including a grandmother who cared for her five days a week.<sup>165</sup>

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159. *Pitt*, Order of Oct. 25, 1994, at 14.

160. *Pitt v. Olds*, 333 S.C. 478, 482, 511 S.E.2d 60, 62 (1999).

161. *Id.*

162. Wallerstein & Tanke, *supra* note 2, at 318.

163. *Id.*

164. *Pitt v. Olds*, No. 91-DR-08-39, at 11 (Oct. 25, 1994) (Order of the Hon. Judy C. Bridges).

165. *Id.* at 9.



The supreme court was correct in reversing the court of appeals because it had not found that the move was in the child's best interest.<sup>166</sup> The trial court's order requiring the mother to remain in South Carolina was replete with findings that the change in circumstances would not benefit the child.<sup>167</sup> Further, the father had been found by the trial court to be a suitable and perhaps more fit parent to raise the child.<sup>168</sup>

### 3. *Societal Concerns: The State's Interest in Protecting Children from Emotional or Physical Danger*

The court of appeals superficially treated the trial court's concern about the child's emotional and physical well-being in the *Pitt* case. The record strongly indicated that the mother's judgment should have been questioned both in her decision to marry George Pitt and in her violation of the court's order that she obtain permission from the court before moving. The mother essentially moved the child to a state where no one was available to monitor her well-being.

Instead, the court of appeals focused on the mother's promise of good faith in maintaining the child's relationship with the father, the child's close relationship with the mother, and the "pressing need" created by the marriage to an Arizona resident.<sup>169</sup> Essentially, the court of appeals served as a second fact-finder, and reversed the trial court in the absence of any clear error of law. Further, the mother's good faith was founded on financing plane tickets through her husband, who probably could not afford them.<sup>170</sup> The marriage was the only pressing need, and the mother likely exercised poor judgment in becoming the third wife of a forty-nine year old Arizona resident who allegedly could not hold down a job, was in great debt, smoked marijuana, and required that she relocate knowing the child was doing well in her current community.<sup>171</sup> None of these factors indicated that the move was in the child's best interest, and may have even indicated that the move would be detrimental to the child. While the supreme court did not directly address the child's physical and emotional well-being, the decision resulted in a protection of these interests by requiring the parent seeking the change in custody to prove changed circumstances.

### 4. *Relocation Decisions Similar to the Pitt Holding: Baldwin v. Baldwin and Day v. Day*

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166. *Pitt v. Olds*, 333 S.C. 478, 482, 511 S.E.2d 60, 62 (1999).

167. The evidence concerning George Pitt strongly indicated that the move to Arizona would be adverse to the child's best interest. See *supra* notes 138-47 and accompanying text.

168. *Pitt*, Order of Oct. 25, 1994, at 14.

169. *Pitt v. Olds*, 327 S.C. 512, 520, 489 S.E.2d 666, 670 (Ct. App. 1997).

170. *Pitt*, Order of Oct. 25, 1994, at 5-6. "[Sonya Pitt] would . . . be relying upon her husband's income to pay for [the] airline tickets. Based upon the testimony of Mr. Pitt and the former Mrs. Pitt, I find that such a reliance would be ill-advised."

171. *Id.* at 4-7.

Other jurisdictions have used custody standards to determine relocation cases and prohibit a move, indicating that *Pitt* was not a holding specific to South Carolina.<sup>172</sup> In *Baldwin v. Baldwin*, the Superior Court of Pennsylvania denied a mother's request to relocate because she had not sufficiently shown that a change in the custody arrangement would benefit the child.<sup>173</sup> In *Baldwin*, the parties had shared legal custody of the child and the father was given partial custody every other weekend and some weeknights, as well as shared holiday visitation.<sup>174</sup> Upon receiving a job offer at Midlands Technical College in Columbia, South Carolina, the mother filed a petition to modify the existing custody arrangement.<sup>175</sup> While Pennsylvania uses a different standard to determine custody,<sup>176</sup> it relies on that custody standard to determine relocation cases.<sup>177</sup> In *Baldwin*, the court denied the mother's request for sole custody, thereby disallowing her move to South Carolina.<sup>178</sup>

The facts in *Day v. Day*<sup>179</sup> are strikingly similar to those in *Pitt*. Although the parties had a true joint physical custody arrangement,<sup>180</sup> the facts otherwise are nearly identical. The mother sought to move her children from Louisiana to Oregon, where she planned to marry an Oregon resident.<sup>181</sup> She sought to modify the custody arrangement so that she could have the children in Oregon during the school year, which required her to be named the domiciliary parent.<sup>182</sup> The mother was required to prove that a change in circumstances had occurred which "materially affected the children's welfare and that the modification proposed was in their best interest."<sup>183</sup> As in *Pitt*, the children had resided in their home town since birth, and the mother had already moved to Oregon to be with her new husband.<sup>184</sup> Further, as in *Pitt*, neither the mother

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172. *Baldwin v. Baldwin*, 710 A.2d 610 (Pa. Super. Ct. 1998); *Day v. Day*, 711 So.2d 793 (La. Ct. App. 1998).

173. *Baldwin*, 710 A.2d at 614 (finding that custody disputes are "delicate issues that must be handled on a case-by-case basis" and that the trial court "carefully considered all relevant factors" when determining whether it was in the child's best interest to relocate to South Carolina or to remain in Pennsylvania).

174. *Id.* at 611.

175. *Id.*

176. Pennsylvania courts use a "best interest of the child" standard, coupled with factors from *Gruber v. Gruber*, 583 A.2d 434 (Pa. Super. Ct. 1990), relating specifically to relocation, to determine custody in relocation decisions. However, the court indicates that the underlying test absent the *Gruber* factors is the best interest of the child analysis, and absent a clear abuse of discretion, a trial court's ruling regarding the best interest of the child will be upheld on appeal. *Baldwin*, 710 A.2d at 614.

177. *Baldwin*, 710 A.2d at 614 (acknowledging that relocation cases are "custody disputes" that "must be handled on a case-by-case basis.")

178. *Baldwin*, 710 A.2d at 614-15.

179. 711 So.2d 793 (La. Ct. App. 1998).

180. Each parent had custody for six months. *Day*, 711 So. 2d at 795.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

nor the new husband had family in Oregon.<sup>185</sup> The record showed that both parents were “loving, nurturing parents.”<sup>186</sup> The trial court found that it was in the best interest of the children to remain in Baton Rouge.<sup>187</sup> The court of appeals upheld the decision stating: “[i]n situations such as this, the stability of the children’s environment and the desirability of maintaining continuity of that environment is an important factor in the determination of which parent should be awarded . . . custody.”<sup>188</sup> The court found that the trial court had properly weighed all of the evidence and sufficiently considered the children’s best interests in the process.<sup>189</sup>

Each of these decisions further indicate that custody should be re-examined in relocation cases, particularly when the parties previously shared custody of the children. In that way, a court can still restrict a custodial parent’s right to move in order to advance the child’s best interest.

## V. CONCLUSION

Although South Carolina has been singled out by practitioners as one of the only states with a presumption against relocation, this perception stems from a lack of solid understanding of South Carolina law. While *Pitt v. Olds* requires any practitioner to heavily research the opinion to understand the result, the South Carolina Supreme Court’s approach to relocation should be followed by more courts seeking a solution to a seemingly unfixable problem. Considering the merits of the technique, the practice of re-examining custody in relocation issues has been unfairly criticized. In re-examining custody, a court more fully considers all of the conflicting interests involved in these cases. The alternative, fraught with presumptions, burdens, and arbitrary factors, inadequately considers the child’s well-being. The argument that custody determinations threaten the child’s stability is weak considering the merits discussed here.

As society increasingly encounters complex relocation issues, it is important to remain focused on the relevant interests of the parties involved without losing sight of what is best for the child. Inevitably, relocation cases will increase as divorce rates increase and custodial parents continue to move in search of jobs or in hopes of changing their lives. As society continues to adjust to the post-divorce family model, and as post-divorce families become more common, it is important to respect the individual custodial arrangement

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185. *Id.* at 797.

186. *Id.* at 795.

187. *Id.*

188. *Id.* at 796. The trial court largely based its decision on the fact that both parties are from the local area, had family on both sides living there, and that the children went to school and church there since birth. *Id.* at 797.

189. *Id.* at 797-98.

rather than seek a blanket remedy that may be inappropriate to a given situation.

In other words, practitioners and courts must remain focused on the needs of the individual family in relocation cases. As research has shown, often joint custody arrangements reflect different interests for the child. Stability comes from both parents in this situation, where stability may come from one parent in sole custody arrangements.

Thus, when parents share custody, relocation should be considered a custody issue in which households are re-examined in light of the new, changed circumstance of a move. While often the custodial parent should be allowed to move with the child, courts should carefully examine both households when the issue arises. The party seeking the change in custody should bear the burden of proving the change would benefit the child. Further, appellate courts should give great deference to the trial court's findings, reversing only when there is a clear error of law. Otherwise, irrelevant precedent may wrongly be used to replace the judgment of a fact-finder who was present to examine the witnesses and the evidence.

While trial courts will continue to struggle with fact-intensive relocation cases, they should be careful when determining whose interests should be protected. Sometimes the child's best interest will not be served by preserving the relationship with the primary custodian. The South Carolina Supreme Court correctly recognized this in *Pitt v. Olds*.

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