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Alessa Thomas

*Michigan State University College of Law*

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### Recommended Citation

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IN SEARCH OF A STANDARD: WHY MICHIGAN'S LEGAL LOOPHOLE IN SOLE  
LEGAL CUSTODY SITUATIONS SHOULD BE CLOSED

by  
Alessa Thomas

Submitted in partial fulfillment of the requirements of the  
King Scholar Program  
Michigan State University College of Law  
under the direction of  
Professor Melanie B. Jacobs  
Spring 2010

## INTRODUCTION

The eventual breakdown of the relationship may seem impossible to future parents at the moment of conception. Few people would have a child<sup>1</sup> together knowing that in the future they would not be together. However, for many parents the union that once was does not last forever. Many difficult problems arise when parents decide to go their separate ways. Even after a divorce or separation has been finalized, the two parents must cooperate to provide for the child – and when the parents cannot agree the courts may become involved. One particularly emotional and complicated situation is when one parent would like to relocate to a distant place with the child and the other parent wishes to preserve the status quo. While one parent may be convinced relocating will create an opportunity to improve both that parent's and the child's life, the other parent who is being left behind will suffer a great loss when the time that parent can realistically spend with the child is diminished. The situation is best demonstrated by way of example.

Imagine you are a newly single parent – last year you finalized your divorce, and ever since you have slowly been rebuilding your life. You have maintained a fairly amicable relationship with your ex-spouse, who spends a significant amount of time with your six-year-old child, but you have sole legal custody. Recently, you were informed that the company you work for is downsizing, and you are likely to be let go. You moved to Michigan when you were married because your spouse's family is in the area, but now relocating back to Texas – where your family lives and there are likely more job opportunities – seems like an attractive idea. Your ex-spouse disagrees, and pleads with you to reconsider moving. Your ex-spouse has a lucrative job in the area and a close relationship with your child. You have decided moving is

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<sup>1</sup> This paper refers to a singular child, but all discussions and laws apply equally to situations where the parents have multiple children together.

the right choice, but your ex-spouse cannot agree with you. You are unsure what the preference of your child would be, but you are convinced your child could adjust and be happy anywhere.

If you are the child you are faced with the Hobson's choice of leaving your primary caregiver, or leaving in the place with which you are familiar. If you relocate, you will leave behind your school, neighborhood, and important mentors in addition to your other parent. However, relocating may also mean new and better opportunities, and it is what your primary caregiver desires. If relocation is denied and the primary caregiver decides to forgo moving in order to retain custody life is still disrupted to a certain extent since your primary caregiver may be disappointed or depressed.

The custodial parent wishing to relocate has likely weighed the pros and cons of the decision. The relocating parent will focus on the opportunity for the child to become close to a new set of her grandparents, and the resulting improvement to the family's economic position. On balance, the custodial parent will believe the move is absolutely necessary to maintain a desirable quality of life. The parent wishing to preserve the status quo, with a great job and frequent access to the child, is likely to oppose the proposed relocation. The non-relocating parent would prefer that the child stay in the area so that the non-relocating parent, and the child's other grandparents, can continue frequent contact with and care for the child. From the non-relocating parent's perspective, the parent wishing to relocate is being selfish, and should try to secure another job in the area since the child is in kindergarten and has a regular daycare provider and routine here at home. The parent wishing to relocate and the parent wishing to maintain the status quo both have legitimate interests and reasons to support their respective positions. This is the dilemma parents, and often the courts, must resolve.

In a world where family relations do not work perfectly on their own the state must step in to provide a legal scheme that sets expectations to ensure that the rights and interests of all family members are considered. This is the realm of family law, and more specifically, child custody law. When parents, for whatever reason, cannot agree as to the best way to raise their child, the legal system is there to help parents create a workable solution for themselves and their children. Situations dealing with child custody are inherently emotionally charged and there is likely no perfect resolution to the conflicts that arise. The dilemma dramatized above is one of relocation,<sup>2</sup> which is perhaps the most difficult problem courts are asked to resolve.<sup>3</sup>

Family law is primarily governed by each individual state, and the approach to the problem of relocation varies across jurisdictions.<sup>4</sup> Michigan has attempted to address relocation disputes, and has statutorily mandated that all custody orders in the state include a provision requiring a parent wishing to relocate to either get consent from the other parent or to get court permission prior to moving more than 100 miles away from the current location.<sup>5</sup> It is through this court hearing determining whether to grant permission to relocate that the legal system seeks to ensure each party's rights and interests are properly addressed and balanced. The Michigan

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<sup>2</sup> Relocation is the term this author will use to refer to a situation where one parent wishes to move to a location other than the status quo with the child. In Michigan, when a parent wishes to relocate that parent must file a change of domicile motion.

<sup>3</sup> See, e.g., Rachel M. Colancecco, Note, *A Flexible Solution to a Knotty Problem: The Best Interests of the Child Standard in Relocation Disputes*, 1 DREXEL L. REV. 573, 575 (2009) (discussing the difficulty courts face when making decisions about relocation).

<sup>4</sup> See generally Linda D. Elrod, *States Differ on Relocation: A Panorama of Expanding Case Law*, 28 SPG FAM. ADVOC. 8 (2006); 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 (1999) (discussing the approaches of various states in the context of how they apply the best interests test); Janet Leach Richards, *Resolving Relocation Issues Pursuant to the ALI Family Dissolution Principles: Are Children Better Protected?*, 2001 B.Y.U. L. REV. 1105, 1106-07 (2001).

<sup>5</sup> MICH. COMP. LAWS ANN. § 722.31 (West 2010). See generally Ericka Domarew, Comment, *Michigan Keeps it Within Limits: Relocation No More than "100 Miles,"* 20 T. M. COOLEY L. REV. 547 (2003) (discussing Michigan's relocation law).

courts are guided by five statutorily enumerated considerations that create a standard for the judge to apply to each request for relocation.

However, in Michigan, there is an area where the state<sup>6</sup> has failed to provide any guidelines for the court charged with resolving contested relocation requests, called change of domicile motions. When the parent who desires to move has sole legal custody of the child, the statutory factors that provide the court with a standard for evaluating the request do not apply. This means that the judge has no standard to apply to the request, and that a parent with sole legal custody may relocate without consent from the non-relocating parent and without undergoing the judicial scrutiny proscribed for other change of domicile motion hearings.

Michigan's legal loophole has created a situation where parents with sole legal custody do not need to get consent from the noncustodial parent prior to moving, but also do not need to make any showing as to the propriety of the relocation in order to secure a court order permitting the move. The loophole fosters unpredictable and likely inconsistent resolutions of change of domicile motions brought by parents with sole legal custody. Most importantly, it does not provide any kind of judicial oversight to ensure the custodial parent, noncustodial parent, and child's interests and rights are being adequately considered. In the hypothetical example above, the custodial parent could relocate to Texas without any consideration of the child's or the noncustodial parent's interests. Relocation should be the product of informed deliberation – deliberation that is not permitted under the current statutory scheme in Michigan.

Michigan's standardless approach in sole legal custody situations frustrates the purpose of custody law, and the efforts of parents, children, lawyers, and judges who are all working to balance competing interests. The loophole in Michigan law should be closed in order to provide

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<sup>6</sup> Typically when I refer to “the state” I mean Michigan specifically or “the state” as in the government generally – if I am referring to a specific state other than Michigan that fact will be specified.

courts with a standard to apply to every custody situation, as well as in order to better protect the child's best interests and the substantial rights of the parents implicated in the change of domicile process – regardless of the custody status of the petitioner.

Part I of this paper will review the custody law in Michigan, including an examination of the situations where courts must enter a custody order, the content of such orders, modification of custody orders, and the best interest factors which guide judicial decisions in the custody context. Part II of this paper will examine relocation and the change of domicile law procedure in Michigan. Part III of this paper will consider the rights at stake in relocation situations, including the interests of the child, the parents, and constitutional considerations. Part IV of this paper will explain how the lack of a standard in the sole legal custody context in Michigan is not in a child's best interest, and why from a policy perspective it is desirable to close the legal loophole and provide courts with a standard to apply to sole legal custody relocation requests. Part IV will also offer some suggestions for reform of the relocation law in Michigan in order to better protect and balance all the competing rights and interests at stake.

## I. CUSTODY LAW

Custody law has been evolving in the United States for many years.<sup>7</sup> While there is little federal law governing the matter, the unified goal at the core of the diverse legal system for dealing with custody is to further the child's best interests and to create a domestic environment that will protect the rights and interests of all the family members.<sup>8</sup> Each state has its own unique method for furthering these goals. The focus of this paper will be on Michigan.

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<sup>7</sup> See Trish Oleksa Haas, Comment, *Child Custody Determinations in Michigan: Not in the Best Interests of Children or Parents*, 81 U. DET. MERCY L. REV. 333 (2004) (noting the development of custody law in Michigan).

<sup>8</sup> See Bartlett, *supra* note 4 at 467-68.

## A. Initial Custody Determination and Parenting Time Arrangement

In Michigan, custody is governed by the Child Custody Act of 1970.<sup>9</sup> Custody determinations arise in various situations,<sup>10</sup> but primarily courts will be asked to enter a custody order when two parents get divorced, or when two unmarried parents can no longer cooperate or are ending their relationship and seek a legal custody arrangement. A court entering a custody order has different custody options – the court may grant joint custody to the parents, or the court may choose one parent to be the sole custodian.<sup>11</sup> The court may also grant some combination of the above custody arrangement choices, giving one parent sole legal custody but both parents physical custody or vice versa.<sup>12</sup> There is no presumption in favor of any type of custody order in Michigan;<sup>13</sup> however, joint custody is the most common custody award. While joint custody is most common, sole custody is significant; one study indicated that as many as 20 percent of custody orders resulted in the award of sole legal custody.<sup>14</sup> Courts are guided by the best interests of the child factors when making a determination as to what type of custody to award.<sup>15</sup> Many different facts and circumstances can influence the court’s custody decision, and it is

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<sup>9</sup> Child Custody Act, MICH. COMP. LAWS ANN. §§ 722.21-29 (West 2010).

<sup>10</sup> MICH. COMP. LAWS ANN. §722.27 gives the court to “award custody of the child to 1 or more of the parties involved or to others” whenever a “child custody dispute has been submitted to the circuit court as an original action ... or has arisen incidentally from another action.” §722.27(1). The same statute gives the circuit court the power to provide for support of the child and “reasonable parenting time.” §722.27(1)(a)-(b). It also permits the court to modify or amend previous orders for proper cause or because of a change of circumstances. §722.27(c).

<sup>11</sup> MICH. COMP. LAWS ANN. §722.26a explains that in custody disputes parents “shall be advised of joint custody,” and explains that the court must explain its reasons for granting or denying joint custody – a denial of joint custody would result in sole custody.

<sup>12</sup> MICH. COMP. LAWS ANN. §722.26a(3) explains that if the court grants joint custody the court may include “a statement regarding when the child shall reside with each parent, or may provide physical custody be shared by the parents in a manner to assure the child continuing contact with both parents.”

<sup>13</sup> MICH. COMP. LAWS ANN. § 722.26a.

<sup>14</sup> Lee E. Teitelbaum, *Divorce, Custody, Gender, and the Limits of Law: On Dividing the Child*, 92 MICH. L. REV. 1808, 1821-22 (1994).

<sup>15</sup> MICH. COMP. LAWS ANN. § 722.23.



wrong to assume that every award of sole custody to one parent is based on a determination that the other parent is unfit.<sup>16</sup>

The type of custody award impacts the rights and duties of the parents. When joint custody is granted, the parents “shall share decision-making authority as to the important decisions affecting the welfare of the child.”<sup>17</sup> That means that parents must make medical and educational decisions about the child together, along with other decisions deemed to be of significant importance.<sup>18</sup> When sole legal custody is granted the sole custodian is the parent who makes the important decisions affecting the welfare of the child.

While the custody determination usually has an impact on the amount of time each parent spends with the child – specifically in that it determines where the child will live – it does not completely decide how much time each parent will spend with the child.<sup>19</sup> “Parenting time” is a separate issue the court will address. Parenting time is wrapped up in the custody determination, but is a separate agreement in that the custody status granted to the parents does not directly mandate what the parenting time agreement will contain. The Michigan parenting time statute presumes that it is in the best interests of the child “to have a strong relationship with both of his or her parents.”<sup>20</sup> Courts are directed to grant parenting time to a parent in a “frequency,

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<sup>16</sup> For example, sole custody may be awarded in situations where the two parents cannot agree or cooperate. Since joint custody requires that the parents make decisions together, an incredibly bitter divorce may result in sole custody being granted to one parent simply because the parents cannot get a long and not because one parent or the other is not loving and careful as to the child. Another important point to remember when considering the meaning of an award of sole custody is that custody decisions are typically reviewed, and even when one party requests review (by way of modification) it is not easily attained. The facts and circumstances in place at the time of the custody award may not be present in the future – for example, a very young parent who was not willing or able to take on significant parent responsibility or involvement at the time of the custody order may mature and become a very responsible and involved parent later in life.

<sup>17</sup> MICH. COMP. LAWS ANN. §722.26a(7)(b).

<sup>18</sup> *Shulick v. Richards*, 273 Mich. App. 320, 327-28 (2006) *citing* *Lombardo v. Lombardo*, 202 Mich. App. 151 (1993). Indeed, if parents cannot cooperate and make decisions together, the result will be an award of sole custody to one of the parents. *Lombardo*, 202 Mich App. at XX.

<sup>19</sup> MICH. COMP. LAWS ANN. §722.27a(1); Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105,115 (2007) (discussing custody and parenting time arrangements).

<sup>20</sup> MICH. COMP. LAWS ANN. §722.27a(1).

duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.”<sup>21</sup> Children have a statutory right to parenting time – therefore unless it is shown by clear and convincing evidence that parenting time would endanger a child’s physical, mental, or emotional health the court must grant parenting time.<sup>22</sup> A parent who is not awarded any form of custody may still be granted substantial parenting time by the court.<sup>23</sup> Parenting time orders are pre-planned determinations of when the child will spend time with each parent. For example, a typical parenting time schedule will set forth which parent the child will spend holidays, birthdays, and vacations with, often assigning one parent odd years and one parent even years.<sup>24</sup>

#### B. Modification of Initial Orders

The original custody and parenting time orders the court issues may be altered under certain circumstances. A party may petition the court for a change in parenting time, and so long as the requested change would not alter the established custodial environment the court may grant or deny the request without conducting an extensive inquiry based on what the court determines to be in the child’s best interests.<sup>25</sup> When the requested parenting time change amounts to a change in the established custodial environment the court must review it in the same way it reviews a request for a change in custody.

Change in custody requests are available for a parent who is dissatisfied with the custody order entered by the court. A parent dissatisfied with the status quo may file a motion to have

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<sup>21</sup> MICH. COMP. LAWS ANN. §722.27a(1).

<sup>22</sup> MICH. COMP. LAWS ANN. §722.27a(3).

<sup>23</sup> MICH. COMP. LAWS ANN. §722.27(1)(b) gives the court the separate power to grant reasonable parenting time.

<sup>24</sup> See, e.g., State Court Administrative Office, *Michigan Parenting Time Guideline* (2010), available at <http://courts.michigan.gov/scao/resources/publications/manuals/index.htm> (last accessed April 18, 2010). Parenting time may be supervised or unsupervised depending on the needs of the child and parents. *Id.* at 13-17.

<sup>25</sup> *Powery v. Wells*, 278 Mich. App. 526, 527-28 (2008); MICH. COMP. LAWS ANN. §722.27a.

the original custody order modified, but must make a proper showing in order to be successful.<sup>26</sup> The parent seeking a change in custody must first show by a preponderance of the evidence that there is either proper cause<sup>27</sup> or a change of circumstances<sup>28</sup> which exist and justify a change in custody.<sup>29</sup> If the parent meets this threshold showing, the court will determine whether an established custodial environment exists.<sup>30</sup> Every change in the amount of time a child spends with each parent does not amount to a change in an established custodial environment.<sup>31</sup> Likewise, every change in domicile will not automatically constitute a change in the established custodial environment. The Court of Appeals held that “it is possible to have a domicile change that is more than one hundred miles away from the original residence without having a change in the established custodial environment.”<sup>32</sup> Convincing a court that there has been a change is often difficult since “the goal of [the statutory custody law] is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances.”<sup>33</sup> If the court finds an established custodial environment, the court must weigh the best interest factors and determine that a change of custody is in the child’s best interests by clear and convincing

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<sup>26</sup> MICH. COMP. LAWS ANN. §722.27(1)(c).

<sup>27</sup> To establish proper cause the movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court; the appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being, and, when a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors. MICH. COMP. LAWS ANN. §§ 722.23(a-1), 722.27(1)(c).

<sup>28</sup> To establish a change of circumstances a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed; the evidence must demonstrate something more than the normal life changes, both good and bad, that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. MICH. COMP. LAWS ANN §§ 722.23(a-1), 722.27(1)(c)

<sup>29</sup> MICH. COMP. LAWS ANN. §722.27(1)(c).

<sup>30</sup> “The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.” MICH. COMP. LAWS ANN. §722.27(1)(c). Established custodial environments are characterized by qualities such as security, stability, and permanence. *Mogle v. Scriver*, 241 Mich. App. 192 (2000).

<sup>31</sup> For example, in *Pluta v. Pluta*, 165 Mich App. 55 (1987) the court held that the custodial environment was not destroyed when the custodial parent left the child in the physical control of the noncustodial parent for a period of time so that the custodial parent could regain financial independence.

<sup>32</sup> *Brown v. Loveman*, 260 Mich. App. 576, 590 (2004).

<sup>33</sup> *Brausch v. Brausch*, 283 Mich. App. 339, 354 (2009).

evidence in order to modify custody.<sup>34</sup> The parent petitioning for a change of custody (or a substantial change in parenting time resulting in a change of the established custodial environment) must bear the burden of proof.<sup>35</sup> If there is not an established custodial environment the judge may modify custody based on a showing by a preponderance of the evidence that the modification is in the child's best interests.<sup>36</sup>

### C. Best Interests of the Child

The court is guided in all its decisions concerning the initial custody decision, custody modification, and parenting time by the best interests of the child standard.<sup>37</sup> This standard is used by every jurisdiction in some form, and is intended to provide the court with factors to consider when determining the arrangement that will best serve the interests of the child. In Michigan, the best interest factors are defined as:

[T]he sum total of the following factors to be considered, evaluated, and determined by the court:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

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<sup>34</sup> MICH. COMP. LAWS ANN. §722.27(1)(c).

<sup>35</sup> MICH. COMP. LAWS ANN. §722.27.

<sup>36</sup> Baker v. Baker, 411 Mich. 567, 579 (1981).

<sup>37</sup> MICH. COMP. LAWS ANN. §§ 722.27a(1), 722.27, 722.23.

- (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute.<sup>38</sup>

A trial court must consider each best interests factor and make factual findings as to each factor before granting custody.<sup>39</sup> While courts adjudicating disputes between parents involving children have a lot of discretion, judges must use the best interest factors to guide their decision.<sup>40</sup> No one factor is determinative as to the question of how custody should be awarded, the best interests factors should be weighed all together and evaluated by the court.<sup>41</sup>

The best interest factors have been heavily debated and criticized by scholars.<sup>42</sup> The best interest standard has been criticized as providing courts that may not be able to reliably determine what the best interests are with too much discretion.<sup>43</sup> Additionally, the best interests factors have been attacked as being vague, overly subjective, and unpredictable.<sup>44</sup> Despite these criticisms, the sentiment behind the standards – to focus on what is best for the child – is the

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<sup>38</sup> MICH. COMP. LAWS ANN. § 722.23.

<sup>39</sup> Overall v. Overall, 203 Mich. App. 450 (1994).

<sup>40</sup> See Child Custody Act, MICH. COMP. LAWS ANN. §§ 722.21-29 (West 2010) (requiring courts to have the best interest factors guide every decision).

<sup>41</sup> MICH. COMP. LAWS ANN. §722.23; McCain v. McCain, 229 Mich. App. 123 (1998)

<sup>42</sup> See generally Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 820-21 (2000) (noting that despite overwhelming popularity with judges and legislatures the standard has come under “scathing criticism” from family law scholars). A full discussion of the pros and cons of the best interest standard is outside of the scope of this paper.

<sup>43</sup> See Haas, *supra* note 7, at 338 (arguing the best interest of the child analysis encourages litigation and fails to further the goal of providing for meaningful relationships between both parents and the child); Ruth Zafran, *Children's Rights as Relational Rights: The Case of Relocation*, 18 AM. U. J. GENDER SOC. POL'Y & L. 163, 178 (2010) (noting that best interests standard is “a vague, subjective, and malleable principle”).

<sup>44</sup> Zafran, *supra* note 43, at 178; Loretta M. Kopelman, *Why the Capta's Baby Doe Rules Should be Rejected in Favor of the Best Interests Standard*, 25 GA. ST. U. L. REV. 909, 923 (2009) (discussing best interest factors tests generally).

proper focus of the courts.<sup>45</sup> While numerous alternatives have been proposed, the best interests standard remains the most widely used tool to guide courts in making custody decisions.<sup>46</sup>

## II. RELOCATION

The relocation of one parent with the child creates a specific type of conflict within custody law. In Michigan, the court rules require any order or judgment awarding custody to include a statement requiring prior approval for any change of domicile from the judge who awarded custody, and a statement requiring notification to the Friend of the Court office of any relocation.<sup>47</sup> The court rule also requires that “a parent whose custody or parenting time of a child is governed by the order shall not change the legal residence of the child except in compliance with ... the Child Custody Act.”<sup>48</sup> This means that every custody order issued in Michigan contains language restricting the freedom of the parents to relocate with the child, and that every person – even parents with sole legal custody – must petition the court for an order permitting a relocation more than 100 miles away from the original home.

### A. Relocation Limits

The Child Custody Act specifically governs relocation in section 11,<sup>49</sup> where it states that “a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child’s legal residence at the time

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<sup>45</sup> MICH. COMP. LAWS ANN. § 722.23.

<sup>46</sup> In fact, the best interests of the child are the goal of government in many countries since the United Nations Convention of the Rights of the Child in 1989 which adopted Article 3, reading: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interest of the child shall be a primary consideration.” While each individual state, country, entity may use different factors or considerations to protect the best interest of the child, the underlying goal is the same. United Nations Convention on the Rights of the Child, Art. 3, Nov. 20, 1989, 28 I.L.M. 1448. While the United States was a primary drafter of the convention, the country has not ratified the convention. However, American law was a key source for the doctrines, and it is clear that the best interests of the child idea is entrenched in U.S. law. *See* Woodhouse, *supra* note 42 at note 2, 831.

<sup>47</sup> MICH. CT. R. 3.211(C)(1)-(2).

<sup>48</sup> MICH. CT. R. 3.211(C)(3).

<sup>49</sup> MICH. COMP. LAWS ANN. § 722.31 (West 2010).

of the commencement of the action in which the order is issued.”<sup>50</sup> This blanket ban on relocation more than 100 miles away is relaxed when the other parent consents to the relocation, or the court enters an order permitting the relocation in accordance with the statutorily mandated factors for the court’s deliberation.<sup>51</sup> Typically, when the parent wishing to relocate more than 100 miles away cannot obtain consent from the other parent a motion for change of domicile will be filed and the judge will hold a hearing. The parent petitioning for permission to relocate has the burden of establishing by a preponderance of the evidence that the change of domicile is warranted.<sup>52</sup> At the hearing, the court will evaluate the propriety of the relocation by considering the following factors:

- (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
- (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
- (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
- (d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
- (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.<sup>53</sup>

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<sup>50</sup> MICH. COMP. LAWS ANN. § 722.31(1).

<sup>51</sup> § 722.31(2). Additionally, the restriction on relocation more than 100 miles away does not apply if the other parent consents to the relocation, the child’s two residences were already more than 100 miles apart, or the change in residence would result in the two legal residences being closer together. The restriction also does not apply if the order governing custody grants sole legal custody to one of the child’s parents. § 722.31. However, consent must be specific, and blanket consents in divorce settlements were held to be inconsistent with the statutory requirement. *Delamielleure v. Belote*, 267 Mich. App. 337 (2005).

<sup>52</sup> *Mogle v. Scriver*, 241 Mich. App. 192 (2000); *Overall v. Overall*, 203 Mich. App. 450 (1994). On review, the family court’s determination is scrutinized under a preponderance of the evidence standard. *Rittershaus v. Rittershaus*, 273 Mich. App. 462 (2007).

<sup>53</sup> MICH. COMP. LAWS ANN. § 722.31(4)(a)-(e). These factors are commonly referred to as the *D’Onofrio* factors because they were first enunciated by the New Jersey case of *D’Onofrio v. D’Onofrio*, 144 N.J. Super. 200; 365 A.2d 27 (N.J. Super. Ch. 1976).

The judge will evaluate each factor “with the child as the primary focus in the court’s deliberations.”<sup>54</sup>

## B. The Impact of an Established Custodial Environment

If the change of domicile will also create a change in the established custodial environment, the relocating parent must additionally establish by clear and convincing evidence that the change is in the best interests of the child.<sup>55</sup> This extra burden of proof is required when the change of domicile will also change the existing custodial environment because the statutory law requires proof by clear and convincing evidence of the best interests of the child in any situation where the established custodial environment is changed.<sup>56</sup> If a parent could petition for change of domicile resulting in a change in the established custodial environment simply by proving by a preponderance of the evidence that the move is warranted under the change-of-domicile factors that parent could avoid the statutorily imposed burden of proof for situations resulting in a change in the established custodial environment.<sup>57</sup> The court has made clear that all changes in domicile do not necessary amount to changes in the established custodial environment.<sup>58</sup> Therefore, the court is required to make a determination as to whether the change of domicile will amount to a change in the established custodial environment based on the agreed to parenting time schedule. This requirement is not explicit in the statute, but follows necessarily based on the court’s mandate to apply the best interest factors to any change in an established custodial environment.<sup>59</sup>

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<sup>54</sup> MICH. COMP. LAWS ANN. § 722.31(4).

<sup>55</sup> *Brown v. Loveman*, 260 Mich. App. 576, 591 (2004).

<sup>56</sup> *Id.*; MICH. COMP. LAWS ANN. § 722.23.

<sup>57</sup> *Loveman*, 260 Mich. App. at 594-95.

<sup>58</sup> *Id.* at 590.

<sup>59</sup> For example, in *Loveman* the court determined that proof by clear and convincing evidence of the best interests of the child was required, and an evidentiary hearing must be held, when it became clear the established custodial



### C. The Sole Legal Custody Exception

While typically a parent wishing to relocate must make some factual showing to justify the relocation, the statute contains an exception for parents who were granted sole legal custody.<sup>60</sup> The statute says: “[T]his section does not apply if the order governing the child’s custody grants sole legal custody to 1 of the child’s parents.”<sup>61</sup> Because of this exception, parents with sole custody must still petition the court for permission to relocate in accordance with the court rule, but the statutorily applied factors for evaluating such petitions do not apply.<sup>62</sup> Proponents of maintaining the exception for parents with sole legal custody may argue that it is warranted in light of the fact that a parent who is not awarded any form of custody must not be involved in the child’s life and therefore there is no reason to require a serious judicial proceeding prior to granting the custodial parent permission to relocate. However, this argument overlooks the fact that the court rule still requires any parent wishing to relocate with the child to petition the court for an order granting permission to move.<sup>63</sup> This court rule begs the question: why require every parent to petition the court for an order if there is not going to be any kind of actual judicial oversight? The rule suggests there is an intention to involve the courts in all aspects of custody and relocation; therefore, the court needs to have some standard to apply to change in domicile motions in all cases.

In light of this exception parents with sole legal custody, hereinafter referred to as custodial parents, do not bear any apparent burden of proof as to whether the move is warranted,

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environment would be changing when the mother relocated with the child to New York after the parents submitted their new parenting time plan. *Id.* at 590-91.

<sup>60</sup> MICH. COMP. LAWS ANN. §722.31(2). This exception was created when the law was amended to restrict relocation of 100 miles or farther in 2001. The previous law as to relocation only placed limits on parties moving outside of the state of Michigan – it did not place any limits or oversight on moves within the state. The law did not differentiate between parents based on custody status prior to this amendment. *See Domarew, supra* note 5, at 564 (discussing Michigan law).

<sup>61</sup> MICH. COMP. LAWS ANN. §722.31(2).

<sup>62</sup> MICH. CT. R. 3.211; MICH. COMP. LAWS ANN. §722.31(2).

<sup>63</sup> MICH. CT. R. 3.211.

and the courts do not have any mandated factors to apply to such petitions.<sup>64</sup> There is, however, some judicial oversight when a change in domicile would result in a change of the established custodial environment, as discussed above. In those cases the court may evaluate the move at least tangentially in reference to the change in the custodial environment under the best interest of the child factors.<sup>65</sup> When, as is often the case, the parent wishing to relocate has sole legal custody and exercises the bulk of the parenting time, there is no need to consider any potential change in the custodial environment, and the court truly will have no standard or factors with which to evaluate the motion for change of domicile.<sup>66</sup> The statute does not set forth any alternate mechanism for evaluating petitions made by custodial parents for relocation, and it is unclear who, if anyone, bears the burden of proof. It is also unclear what standards, factors, or considerations the judge should use to evaluate such petitions. This uncertainty creates a significant challenge for courts who are asked to review change of domicile petitions and determine whether to grant or deny them. It leads to a wide range of varying decisions based on many factors creating a body of law that lacks uniformity and predictability. It also creates an incentive to litigate these issues, since the rules are not clear.

Litigation about the exception to the application of the change-of-domicile factors has ensued, and the Court of Appeals has interpreted the provision literally without providing much guidance for the lower courts. In *Spires v. Bergman*,<sup>67</sup> a mother with sole legal and sole physical

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<sup>64</sup> The statutory exception speaks of parents with “sole legal custody” however physical custody is relevant in that when the parents share joint physical custody *and* the proposed change of domicile also constitutes a change in the established custodial environment a court must apply the best interest factors to determine if the requested move is in the child’s best interests. *Brown v. Loveman*, 260 Mich. App. 576, 598 n. 7 (2004). Therefore the court is not without *any* standard to apply in cases where the parties share physical custody since it has been instructed to evaluate the move under the best interest factors. Due to the statutory exception, the court has absolutely no standard to use when a parent has sole legal and sole physical custody.

<sup>65</sup> *Loveman*, 260 Mich. App. at 591.

<sup>66</sup> *Spries v. Bergman*, 276 Mich. App. 432 (2007) (noting that any evaluation of the best interest factors and change of custodial environment is not necessary in this case since the mother has sole legal and sole physical custody).

<sup>67</sup> 276 Mich. App. 432 (2007) appeal denied, 480 Mich. 948 (2007).

custody moved to change the child’s domicile.<sup>68</sup> The father opposed the relocation.<sup>69</sup> The court granted the mother’s petition, concluding that since the mother had sole custody it “essentially had no choice but to approve the proposed change of domicile.”<sup>70</sup> The father appealed and argued that the court was required to hold a full evidentiary hearing and evaluate the change-of-domicile factors prior to approving the mother’s motion for relocation.<sup>71</sup> On appeal the court held that an evidentiary hearing and consideration of the change-of-domicile factors was not required because the mother had sole legal custody, and because she also had sole physical custody there was no question about any change of established custodial environment, so consideration of the best interest factors was not warranted.<sup>72</sup>

Additionally, in *Smead v. Smead*,<sup>73</sup> the Court of Appeals made clear that it is not proper for courts to consider the change-of-domicile factors when evaluating motions for change of domicile filed by a parent with sole legal custody.<sup>74</sup> The *Smead* court held that change of domicile motions must be granted without consideration of the factors when the petitioning parent has sole legal custody and there will not be a change in the established custodial environment as a result of the relocation.<sup>75</sup> In light of the caselaw interpreting the change of domicile statute and court rules, courts are left with a requirement to review every motion for change of domicile that is filed, but are sometimes left without any guidance as to how the motion should be evaluated.

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<sup>68</sup> *Id.* at 434.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 435.

<sup>71</sup> *Id.* at 436.

<sup>72</sup> *Spries* has changed the way courts evaluate relocation, as well as the way they conduct hearings bearing on the initial custody determination. The Michigan Family Law Benchbook – a guide for judges – noting that in light of the *Spries* decision it would be prudent to advise parties “that if they can’t agree on important medical, legal, and educational issues regarding the child, one of them may get sole custody and have the right to move away from Michigan without a hearing or notice.” INSTITUTE OF CONTINUING LEGAL EDUCATION, MICHIGAN FAMILY LAW BENCHBOOK, 3-30 (Supplement 2009).

<sup>73</sup> *Smead v. Smead*, Docket No. 283066, 2009 WL 1139263 (Mich. App. April 28, 2009).

<sup>74</sup> *Id.* at \*3.

<sup>75</sup> *Id.* at 3-4.

### III. RIGHTS AND INTERESTS AT STAKE

In any custody situation both the parents and the child have rights and interests that will be impacted by the court's decision. These rights and interests are magnified in relocation disputes. Lawmakers and courts must give adequate consideration to all the rights and interests at stake in order to make wise, legitimate, and fair decisions. If relocation disputes are resolved without reference to each party's stake in the matter the court making the determination will lack important information, and the decision may be one-sided. Additionally, any party whose rights and interests are given short shrift is likely to find the decision illegitimate and unfair.<sup>76</sup> To be successful, relocation law must facilitate reasoned deliberation. To facilitate reasoned deliberation a standard must exist; therefore, Michigan needs to craft an appropriate standard for situations where a parent with sole legal custody requests relocation. The current status of the law – pro forma approval and no evaluation – does not accomplish any of the goals the Child Custody Act was created to promote.

#### A. Rights and Interests of the Child

The wellbeing of the child is the primary concern of the state – indeed protecting the child is the major justification for state intervention in custody disputes.<sup>77</sup> The Michigan Custody Act specifically mandates that all actions and determinations taken should be done with the best interests of the child in mind;<sup>78</sup> therefore it is incumbent upon lawmakers and courts to consider the rights and interests of the child. Social scientists have been studying the impact of divorce on children for many years, and recently some studies have focused specifically on

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<sup>76</sup> A feeling that the decision is not legitimate or fair may lead a person to ignore the court order – causing greater conflict among the family members and perhaps exposing that person to criminal liability if it rises to the level of kidnapping.

<sup>77</sup> Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381, 390-92 (2000) (discussing the justifications for state intervention into family matters).

<sup>78</sup> Child Custody Act, MICH. COMP. LAWS ANN. §§ 722.21-29 (West 2010).

relocation.<sup>79</sup> This interdisciplinary research can be valuable to lawmakers and courts as they fashion appropriate responses to relocation requests. The primary studies have focused on situations where a custodial parent relocates leaving a noncustodial parent behind,<sup>80</sup> exactly the scenario that remains ungoverned by any standard in Michigan.

While social science data remains important, it has certain weaknesses and there is not a clear consensus among the experts.<sup>81</sup> Largely there are two divergent positions. Some experts believe the research demonstrates that a stable relationship between the child and his or her primary caregiver is the most influential and important factor in that child's adjustment and development. Experts in this camp favor a presumption permitting relocation of the custodial parent.<sup>82</sup> Other researchers – generally the bulk of the newer studies – believe the research shows a child will adjust and develop best when that child has a strong bond with both parents.

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<sup>79</sup> Saanford L. Braver, et al., *Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations*, 17 J. FAM. PSYCHOL. 206 (2003).

<sup>80</sup> Samara Nazir, Comment, *The Changing Path to Relocation: An Update on Post-Divorce Relocation Issues*, 22 J. AM. ACAD. MATRIM. LAW. 483, 492 (2009); Kenneth Waldron, *A Review of Social Science Research on Post Divorce Relocation*, 19 J. AM. ACAD. MATRIM. LAW. 337, 339 (2005).

<sup>81</sup> Social science findings are correlations; therefore they do not prove causal relationships. In addition they are probabilities, so while you can say that 50% of children will react a certain way you cannot say this specific child will react a certain way. See Waldron, *supra* note 80, at 343-44 (noting weaknesses of research).

<sup>82</sup> Psychologist Judith Wallerstein is the most famous proponent of this viewpoint. See generally Judith S. Wallerstein and 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 (1996). Studies favoring a presumption in favor of permitting a custodial parent to relocate focused on findings that the frequency of visits from noncustodial parents do not have significant impact on the child's development and that the custodial parent's ability to parent is most important in shaping the development and adjustment of the child – therefore, these researchers conclude, improvements in the custodial parent's life gained from relocation will improve the child as well. See Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40 FAM. L.Q. 281, 287-90, 293 (2006) (explaining good parenting by custodial parent is more effective in protecting the child from the negative impact of divorce). See also E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 133-34 (2002); FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART 75 (1991); ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD 271 (1992). For example, one study found that a child's opportunities, even into adulthood, are shaped by the mother's post divorce financial circumstances – if the mother is the sole custodian and is able to relocate and improve her financial situation that will directly impact the child's future. Judith S. Wallerstein & Julia M. Lewis, *The Unexpected Legacy of Divorce: Report of a 25-Year Study*, 21 PSYCHOANALYTIC PSYCHOL. 353, 362 (2004).

These experts favor a presumption against relocation, or at least a neutral relocation standard.<sup>83</sup> The only major empirical study to examine relocation specifically did not find evidence to support a presumption in either direction – this study suggested that a preponderance of the evidence standard would be appropriate to assess relocation requests from custodial parents.<sup>84</sup> Researchers representing both views agree that relocation always has the possibility of creating risks for the adjustment of the child.<sup>85</sup> A 2003 study confirms many earlier assumptions about relocation – that children of divorced parents who are separated from one parent by more travel time of more than an hour have greater mental and physical health problems compared to children of divorced parents who do not relocate.<sup>86</sup> The import of the social science research for policymakers is to focus on what factors mitigate the risks of poor adjustment, and in what circumstances relocation is most beneficial to the child. Given that relocation is unavoidable in our increasingly mobile society, lawmakers may be able to use the social science information to create a law that will increase situations where relocation is permitted only when the benefits outweigh the risks.<sup>87</sup>

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<sup>83</sup> See Glennon, *supra* note 19, at 113-115 (explaining that the dominant view of the 1970s that children need only one psychological parent has given way to a view that co-parenting arrangements are ideal); Richard A. Warshak, *Alienating Audiences from Innocence: The Perils of Polemics, Ideology, and Innuendo*, 48 FAM. CT. REV. 153, 155 (2010) (“A large body of evidence demonstrates that children normally develop close relationships with both of their parents, and that after divorce children do best when they maintain these meaningful relationships.”).

<sup>84</sup> See Braver, *supra* note 79 (study analyzed 14 variables and only five of the fourteen showed statistical significance, with no significant difference between groups representing current psychological and physical functioning); Robert Pasahow, *A Critical Analysis of the First Empirical Research Study on Child Relocation*, 19 J. AM. ACAD. MATRIM. LAW. 321, 335 (2005).

<sup>85</sup> See Waldron, *supra* note 80 at 369; Wallerstein & Tanke, *supra* note 82 at 311 (cautioning against increasing disruption of divorce by adding a major relocation).

<sup>86</sup> See Braver, *supra* note 84, at 214 (finding that children from divorced family’s who lived more than an hour’s distance from one parent as compared to divorced children from families that did not separate geographically were more worried about financial support, felt more hostility in interpersonal relations, suffered more distress related to their parents’ divorce, perceived their parents less favorably, and rated themselves less favorably on their general physical health, life satisfaction, and emotional adjustment).

<sup>87</sup> See Richards, *supra* note 4, at 1005 (discussing our increasing mobility); Elrod, *supra* note 4, at 8 (“approximately one American in five changes residences each year”).

The risks of relocation may outweigh, or at least be mitigated under certain factual scenarios.<sup>88</sup> Children older than the age of 6 are significantly more capable of maintaining meaningful relationships with a parent that is not present all the time.<sup>89</sup> If a relocation can be postponed until children are older it is likely to be less harmful in that the child will be able to form a close relationship with both parents under an appropriate parenting time plan and therefore be more likely to gain the benefits of a close relationship with both parents.<sup>90</sup> Additionally, if the relocation will move the status of the relocating parent from below the poverty line to above the poverty line it is likely to significantly benefit the child.<sup>91</sup> If the relocation is from an area where the child has little support in the way of friends, mentors, and other family members to an area where there is significant support the benefits of the move may outweigh the risks.<sup>92</sup> When the child has already successfully adjusted to the divorce prior to the move it is more likely the child will be able to re-adjust in the face of relocation, a child who is already struggling to cope with the legal separation of his or her parents will likely be further damaged by the trauma of relocation.<sup>93</sup> If the parents maintain open communication and cooperation, and have the will and resources to facilitate frequent travel for continued visitation it is more likely the negative effects of the relocation can be mitigated. Likewise, if the

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<sup>88</sup> Waldron, *supra* note 80, at 369.

<sup>89</sup> *Id.* at 371. See also Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-being of Children: A Meta-Analysis*, 110 PSYCHOL. BULL. 26 (1991); Arthur B. Elster & Michael E. Lamb, *Adolescent Fathers: A Group Potentially at Risk for Parenting Failure*, 3 INFANT MENTAL HEALTH J. 148 (1991); Judith A. Seltzer, *Relationships Between Fathers and Children Who Live Apart: The Father's Role After Separation*, 53 J. MARRIAGE & FAM. 79 (1991).

<sup>90</sup> Waldron, *supra* note 80, at 353-55, 371; See generally JOHN BOWLBY, ATTACHMENT AND LOSS: VOLUME I - ATTACHMENT (1969); ATTACHMENT AND LOSS: VOLUME II - SEPARATION (1973); ATTACHMENT AND LOSS: VOLUME III - LOSS (1980); JAY BELSKY & TERESA NEZWORSKI, CLINICAL IMPLICATIONS OF ATTACHMENT (1988); A. SAMEROFF & R. EMDE, RELATIONSHIP DISTURBANCES IN EARLY CHILDHOOD (1989) (discussing attachment patterns of children and the impact of breaking attachment patterns on long-term adjustment).

<sup>91</sup> Waldron, *supra* note 80, at 370. However, other than the movement from poverty to not poverty, additional increases in wealth were not found to have the same beneficial impact. See generally ROBERT E. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT (1998).

<sup>92</sup> Waldron, *supra* note 80, at 370.

<sup>93</sup> *Id.*

relocation would remove the child from a high conflict situation – such as one where the noncustodial parent is violent or has a substance abuse problem – research demonstrates this will benefit the child.<sup>94</sup>

In light of these findings, sole legal custody relocation requests should be examined under an approach that mandates careful examination of the factors that bear on the child’s adjustment. Such an approach would further the Child Custody Act’s goal of protecting the best interests of the child. If a court is required to consider the age of the child, the child’s adjustment to the divorce and all the other relevant indicators of how the child will adjust to relocation, the court will be more likely to render a decision that furthers the child’s best interests. Since each individual child will have different needs, it is important for the judge to gather the facts specific to each situation when rendering a change in domicile decision. Currently, Michigan law governing change in domicile motions made by parents with sole legal custody mandates near automatic approval of all requests. This mandate prevents courts from gathering all the facts and weighing the benefits and harms the relocation will impart upon the child.

While the gender of the parent relocating or remaining is irrelevant to some aspects of the best interests of the child, it should not be excised from consideration. The majority of parents seeking relocation are mothers.<sup>95</sup> Therefore, the majority of parents who will be working to maintain a strong relationship with the child over a great distance are fathers. Some studies have found that for men the parenting role is not “continuous and singular” but rather is “serial or multiple.” These studies have shown that men assume the responsibilities of a father within

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<sup>94</sup> *Id.* at 370-71.

<sup>95</sup> Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation*, 40 U.C. DAVIS L. REV 1747, 1797 (2007) (explaining that women are the typically the custodial parent seeking to relocate, and noting 90% of parents seeking relocation were women). *See also* Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 U. LOUISVILLE J. FAM. L. 791, 846 (1992) (finding in 200 cases surveyed, only eight involved custodial fathers seeking to remove children).



households and marriages – often transferring loyalties to a new family.<sup>96</sup> The implication of these findings may be that fathers are less likely to be involved in a child’s life the further removed that child is from the father. If a child relocates with his or her mother, the father will be left to find a new family structure to attach to, and may, as far as energy and attention goes, replace his biological child with a new family.<sup>97</sup> If, as the social science seems to suggest, involvement of both parents is important for children, then policymakers should consider encouraging parents to remain in close proximity in order to increase the chances the father will remain involved.<sup>98</sup>

## B. Rights and Interests of the Parent Wishing to Relocate

A parent who has petitioned the court for permission to relocate with the child has reasons – often legitimate and compelling reasons – for desiring relocation. Additionally, this parent, as an American, has a constitutional right to travel.

### 1. *Reasons for Relocation*

A custodial parent wishing to relocate with their child ideally has weighed the pros and cons of moving and determined that the move will best further the interests of the family. A parent may wish to relocate for numerous reasons, such as (1) improving the economic situations of the family; (2) a new romantic relationship; (3) moving closer to support systems such as extended family; or (4) educational opportunities.<sup>99</sup> Moving for a job that pays a higher wage will improve the life of the relocating parent, and likely will also impart benefits to the child.

Additionally, having the relocating parent’s new love interest step into a parenting role may be

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<sup>96</sup> NANCY E. DOWD, REDEFINING FATHERHOOD 28 (2000)

<sup>97</sup> *Id.* (explaining that men will take on the role of a father regardless of actual biological attachment).

<sup>98</sup> See e.g., Joan B. Kelly, *Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce*, 19 J. AM. ACAD. MATRIM. LAW. 237, 244-45 (2005). This is not to say it is impossible for a father to remarry and transfer loyalties even if the mother and child remain in the same area – but in theory at least the more frequent the child’s involvement in the father’s life the more likely the father will remain invested in that child’s life.

<sup>99</sup> Richard A. Warshak, *Social Science and Children’s Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83, 102 (2000).

beneficial to the child. More contact with extended family may provide the child with an additional support system. If the parent who is relocating is doing so to pursue better educational opportunities, it is likely this will enrich that parent's life and perhaps lead to a higher wage, or at least greater knowledge to pass on to the child.<sup>100</sup>

There are also motivations for relocation that may be more nefarious. A custodial parent may wish to relocate in order to frustrate the noncustodial parent's time with the child, to exact revenge on the noncustodial parent, or to otherwise negatively impact the child's relationship with the noncustodial parent.<sup>101</sup> A custodial parent may want to interfere with the child's relationship with the noncustodial parent due to hurt feelings, a lack of confidence in the noncustodial parent, personal animosity, or any other personal reason that may not have anything to do with the noncustodial parent's actual relationship with the child.<sup>102</sup> A custodial parent may also want to relocate for frivolous reasons unrelated to a specific desire to harm the noncustodial parent but nonetheless minimizing the importance of that parent's desire to be in the child's life and the child's wishes to be near the noncustodial parent. The custodial parent may feel dissatisfied with life after the divorce and simply want a fresh start – regardless of if there are any actual opportunities for employment or support in a new area. This custodial parent may be involved in a new romantic relationship that would not have a positive impact on the child. There are numerous motivations for wanting to start over in a new place; however, when the rights and interests of multiple people are implicated every motivation may not justify further separation of the family.

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<sup>100</sup> Judith S. Wallerstein, *Amica Curiae Brief of Dr. Judith S. Wallerstein, Ph.D.*, filed in the Case No. S046116, *In re Marriage of Burgess*, Supreme Court of the State of California, Dec. 7, 1995, at 31. The *Burgess* case reversed California's prior approach to relocation, creating a presumption in favor of relocation based on the court's conclusion that a strong bond with the primary caregiver is the most important thing for a child's wellbeing. *See generally In re Marriage of Burgess*, 13 Cal. 4th 25 (1996).

<sup>101</sup> *See Bruch supra* note 82, at 282.

<sup>102</sup> *Id.* at 282-83.

## 2. *Right to Travel*

In addition to the myriad of compelling reasons to relocate, a custodial parent has a constitutional right to travel.<sup>103</sup> The right to travel is considered a right of national citizenship, and arguably any limitations on an individual's choice of where to live, work, and carry on their life is abridging this right to travel.<sup>104</sup> The right to travel has been recognized by the Michigan courts as well as by the United States Supreme Court as a fundamental right. Therefore any law abridging the right to travel must meet strict scrutiny.<sup>105</sup> Strict scrutiny requires the state to have a compelling interest and that the law be narrowly tailored to further that interest.<sup>106</sup>

While laws restricting relocation may infringe on the right to travel, it is likely that such laws can survive strict scrutiny. While the law in Michigan has not been challenged, any challenge to it would likely be analogous to the similar law that was challenged in Indiana. In *Baxendale v. Raich*,<sup>107</sup> the court held that trial courts may, but are not required to, order a change in custody upon relocation.<sup>108</sup> The court found that this ruling – stripping the mother of her physical custody order if she was going to relocate – did not violate the mother's constitutional right to travel.<sup>109</sup> The mother argued the order to change custody if she relocated violated her right to travel because it forced her to choose between moving and retaining physical custody of

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<sup>103</sup> The right to travel's fundamental nature has been recognized by many courts, most importantly, the United States Supreme Court. *See Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (overruled on other grounds); *United States v. Guest*, 383 U.S. 745, 757-59 (1966). *See also* Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 2-3, 67-80 (1995-96) (discussing the right to travel in the custody context).

<sup>104</sup> *Jones v. Helms*, 452 U.S. 412, 418-19 (1981) (“The right to travel has been described as a privilege of national citizenship, and as an aspect of liberty that is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. Whatever its source, a State may neither tax nor penalize a citizen for exercising his right to leave one State and enter another.”).

<sup>105</sup> *Gilson v. Department of Treasury*, 215 Mich. App. 43, 50 (1996) (“Because the right to interstate travel is a fundamental right, we will review a statute that penalizes the right to travel under the strict scrutiny test, i.e., the statute will be upheld if its classification scheme is precisely tailored to serve a compelling governmental interest.”)

<sup>106</sup> *Id.*

<sup>107</sup> 878 N.E.2d 1252 (2008).

<sup>108</sup> *Id.* at 1258.

<sup>109</sup> *Id.* at 1259-60.

her child.<sup>110</sup> Noting that state courts have taken different approaches, the Indiana court recognized that custody orders may chill the right to travel and have the potential to violate the constitution, but that there are other considerations that can outweigh any individual's right to travel.<sup>111</sup> The court stated that "we think it clear that the child's interests are powerful countervailing considerations that cannot be swept aside as irrelevant in the face of a parent's claimed right to relocate."<sup>112</sup>

Therefore, while lawmakers must provide due consideration to a parent's right to travel when crafting laws to regulate relocation in the custody context, some legal standard governing relocation is widely accepted as consistent with a parent's constitutional rights. Regardless, the fact that relocation implicates a fundamental right underscores the importance of seriously considering the rights of individuals seeking court permission to relocate. Since the rights involved in relocation situations are so important, lawmakers must ensure they provide courts with the ability and incentive to carefully consider all factors when ruling on petitions for change of domicile.

### C. Rights and Interests of the Parent Wishing to Maintain the Status Quo

The parent who wishes to prevent the relocation may also have compelling, legitimate reasons for wishes to preserve the status quo. It is also possible that this parent is opposing the relocation request for vindictive or selfish reasons. The parent who desires to thwart relocation likely feels that he or she is going to lose any realistic opportunity to be an involved parent. When a child does not live in the same area as both parents, the parent not living with the child has a diminished ability to be involved with routine parenting tasks. The parent who is "left

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<sup>110</sup> *Id.* at 1259.

<sup>111</sup> *Id.* at 1259-60.

<sup>112</sup> *Id.* at 1259. *See also In re Marriage of Ciesluk*, 113 P.3d 135, 146 (Colo. 2005) (discussing the right to travel in the custody context).

behind” is no longer going to be as able to be as involved in school activities, religious education, extracurricular activities, and regular discipline.<sup>113</sup> Visitation and parenting time become less convenient and require greater pre-planning and organization. Time is lost in transit that previously could have been spent with the child. Even if it is possible to arrange for extended parenting time, this parenting time is likely going to occur on long holidays, or at least weekends. The non-relocating parent may become distanced from the responsibilities of parenting, such as help with homework or discipline, and become more of a vacation centered parent. This lessens the breadth of the parenting experience and diminishes that parent’s role in their child’s life.<sup>114</sup>

On the other hand, this parent may wish to prevent a relocation that would truly improve the child’s life for selfish reasons. The parent advocating for the status quo may simply want to avoid any personal inconvenience when it comes to parenting. The opposition may not be due to the diminished parenting time and ability to be involved in routine parenting activities, but merely due to a desire to be involved without making any sacrifices.<sup>115</sup> Alternatively, the parent may be primarily concerned with preventing his or her ex-spouse from moving on or finding happiness. The opposition to the relocation may be due to a desire to control the other parent, or to spite the other parent. These motivations should not be permitted to prevent a well-meaning parent from relocating to improve his or her life and the life of the child.<sup>116</sup>

One argument against giving any weight to a noncustodial parent’s interests – especially when the noncustodial parent does not have any form of custody – is that there has already been

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<sup>113</sup> See Warshak, *supra* note 99, at 91-94.

<sup>114</sup> *Id.* at 92-101 (discussing how relocation impacts children’s relationships with non-custodial parents).

<sup>115</sup> See Bruch, *supra* note 82, at 282 (discussing how the inconvenience of visits is distasteful for non-relocating parents).

<sup>116</sup> *Id.* (discussing how opposition to a move may be motivated not by the child’s welfare but by a desire to do “battle” with the custodial parent).

a judicial hearing determining that this noncustodial parent is the less fit parent, and that it is in the best interests of the child to have the custodial parent making the decisions. This argument has some merit. It is true that at the initial custody determination a judge decided to grant sole legal custody to the other parent, therefore, the judge determined it was in the child's best interests to have the custodial parent take on the responsibilities, and benefits, of parenting. However, this argument fails to account for the noncustodial parents who do not fit into the stereotypical mold.<sup>117</sup>

First, not all initial custody determinations are disputed. Perhaps the noncustodial parent was unrepresented at the custody hearing and was unable to adequately present his or her arguments, resulting in an award of sole custody to the other parent that may not have been justified. Additionally, perhaps the noncustodial parent consented to give the custodial parent sole legal custody. Many parents do not want to subject their child to a contested custody hearing and will come to an agreement which is simply made official by the judge – often this agreement will result in sole custody to one parent.<sup>118</sup> Perhaps there was consent to sole custody because the parties had an agreed upon parenting time schedule that satisfied the noncustodial parent. The noncustodial parent may have been willing to agree to allow the other parent to have the title of sole custodian in exchange for avoiding a contested hearing. It is likely that the noncustodial parent did not understand the rights he or she would give up in the relocation context by agreeing to sole custody for the other parent. Secondly, relocation requests may be

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<sup>117</sup> The stereotype being a parent who is fairly uninvolved, and/or not invested in the child's life, or who is otherwise unfit, such as suffering from a substance abuse problem and has rightly been adjudged the less fit parent in the first instance.

<sup>118</sup> See Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 931, 973 (2005) (noting that parties who forgo litigation usually agree to award sole custody to the mother – 85 percent of parents will agree to a custody arrangement without a hearing); Stephen J. Bahr, et al, *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?*, 28 FAM. L.Q. 247, 257 (1994) (citing a 1993 study which found custody was given to the mother in 86 percent of cases upon agreement of the parties).

made at any point while the child is a minor. The disputed relocation may be occurring ten years after the initial custody order – circumstances may have changed significantly rendering the deference afforded to the sole custodian unwarranted in the particular situation.<sup>119</sup> The possible temporal distance between the initial custody determination and the change of domicile request merits a new evaluation of each party’s interests and arguments.

Additionally, the parties may be more or less involved in the child’s life than the custody status would suggest. For example, a parent without any actual custody may have been exercising considerable parenting time and might have a strong relationship with the child despite the fact that the other parent has sole legal and physical custody under the original order. Finally, relocation raises the stakes. A party may be more concerned about preventing relocation of a child than that party was as to custody. The initial custody hearing may not have been properly adversarial to determine the rights of the parties in the relocation context, as these are two separate issues. The parents may have had an informal agreement at the time of the custody dispute as to parenting time, or they may have arranged a parenting time agreement. The noncustodial parent may be perfectly happy without any legal custodial status while that parent is still able to spend considerable time with his or her child. It is good policy to re-evaluate the specific situation when relocation, a significant change, is an option.

#### D. Fundamental Rights

Both the Michigan Courts and the United States Supreme Court have recognized a fundamental right belonging to parents, allowing parents to raise their children as they see fit.<sup>120</sup>

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<sup>119</sup> Especially since custody modification may not have been filed for, or if it was, it may have been triggered by the relocation request, and courts treat these as separate issues, do not treat relocation as a per se change in circumstances, and will often grant relocation request, which likely was filed first, prior to even considering the custody modification request.

<sup>120</sup> The right was first recognized by the United States Supreme Court in *Meyer v. Nebraska*, 262 U.S. 390 (1923). *See also Troxel v. Granville*, 530 U.S. 57, 65 (2000).

Parents have a “fundamental right and liberty interest in managing the care, custody, and control of their children.”<sup>121</sup> When a fundamental right is implicated, strict scrutiny applies to any law infringing upon this right – therefore, the state must have a compelling interest, and the proposed action must be narrowly tailored.<sup>122</sup>

Typically, the fundamental right to rear children is implicated when third parties, not the parents, desire to assert control over the children or visitation rights.<sup>123</sup> The fundamental right to parent is possessed by both parents, and relocation is one scenario where these identical rights are likely to conflict. When a court makes a decision as to a requested relocation – either denying the relocation or permitting it – the court is arguably infringing on one parent’s fundamental right to raise his or her child. If a court denies relocation, the parent petitioning to relocate is denied the opportunity to relocate with the child – implicitly this desire to relocate was a decision grounded in the way that parent wanted to raise his or her child. Likewise, a parent who opposes a relocation that is permitted is then denied his or her ability to choose where to raise the child.

Michigan has not addressed whether or how this fundamental right is implicated in the relocation context; however, other jurisdictions have examined the issue. New York courts have recognized that “consideration of whether the relocation of the child would negatively affect the fundamental right of reasonable access of the parent left behind clearly is essential.”<sup>124</sup> In New York, the courts have ensured this fundamental right is given consideration and appropriate weight. The New York courts created a threshold issue in relocation cases that first asks

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<sup>121</sup> *Troxel*, 530 U.S. at 65; Alyson Oswald, *They Took My Child! An Examination of the Circuit Split Over Emergency Removal of Children from Parental Custody*, 53 CATH. U. L. REV. 1161, 1164-65 (2004) (discussing the American guarantee to parents of the right to care, custody, and control of children).

<sup>122</sup> *Brinkley v. Brinkley*, 277 Mich. App. 23, 30 (2007).

<sup>123</sup> For example, in *Troxel* the paternal grandparents petitioned the court for visitation of the child born out of wedlock. *Troxel*, 530 U.S. at 60.

<sup>124</sup> In the Matter of Kathleen M. Bodrato v. Biggs, 274 A.D.2d 694, 696 (N.Y. 2000) (internal quotations omitted); *Messler v. Messler*, 218 A.D.2d 157, 159 (N.Y. 1996).



“whether the relocation of the child would negatively affect the fundamental right of reasonable access of the parent left behind.”<sup>125</sup> If it is established that this fundamental right will be implicated, a presumption that the proposed relocation is against the child’s best interests will apply. New York assumes that a child’s best interest is furthered by “being nurtured and guided by both parents.”<sup>126</sup> Therefore New York combines the consideration of the fundamental rights at stake with the consideration of the child’s best interest in order to ensure the best interest determination will properly consider the adverse impact of one parent being effectively deprived of regular and meaningful access to the child.<sup>127</sup>

Washington has addressed the issue more directly. In a recent case a custodial parent who was denied the right to relocate argued that Washington’s relocation statutes were unconstitutional because they violated “a fit custodial parent’s fundamental right to autonomy in child-rearing decisions.”<sup>128</sup> The court held that the relocation statutes were constitutional. The

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<sup>125</sup> *Messler*, 218 A.D.2d at 159.

<sup>126</sup> *Id.* at 159 quoting *Daghir v. Daghir*, 82 A.D.2d 191, 193 (N.Y. 1981).

<sup>127</sup> *Messler*, 218 A.D.2d at 159.

<sup>128</sup> *Momb v. Ragone*, 132 Wash. App. 70, 75 (2006). The statutes at issue were summarized by the court:

RCW 26.09.187 sets forth the criteria for the entry of a permanent parenting plan upon the dissolution of a marriage. As part of the parenting plan, primary residential placement is established. If the custodial parent wishes to relocate, the non-relocating parent has the opportunity to object to the relocation of the custodial parent. RCW 26.09.480. The custodial parent may be precluded from relocation by a showing that the detrimental effects of the relocation outweigh the benefit of the change to the child and the relocating parent. RCW 26.09.520. When balancing the detrimental effects of the relocation against the benefit of the change, the court must consider the factors set forth in RCW 26.09.520. These factors are as follows:

- (1) The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;
- (2) Prior agreements of the parties;
- (3) Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;
- (4) Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191;
- (5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;
- (6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;

state intrusion was justified by the fact that relocation decisions implicate the mental and physical health of the child.<sup>129</sup> Additionally, the court found the statutory scheme adequately considered all the interests involved – noting that a decision to relocate affects both parents and the child.<sup>130</sup>

Florida has also recognized relocation situations implicate this fundamental right. A Florida court noted that a parent wishing to exercise her fundamental right to parent by relocating with her children must recognize that the father shares the same fundamental right.<sup>131</sup> The court concluded that because the parties agreed to “shared parental responsibility in the marital settlement agreement” and that the court had ordered such, the parties have waived any reasonable expectation of the right to determine where the children will live as to each other.<sup>132</sup> Therefore, while the parents maintain the fundamental right as to third parties, they may not invoke it against each other, essentially giving the state a compelling reason and duty to intervene when the parents cannot disagree.<sup>133</sup>

In 2005, the Colorado Supreme Court adopted the approach of the New Mexico Supreme Court, which emphasizes the competing fundamental rights of the parents, and the state’s concern for the best interests of the child.<sup>134</sup> The Colorado court explained the competing interests: “relocation disputes present courts with a unique challenge: to promote the best interest

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- (7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;
  - (8) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;
  - (9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;
  - (10) The financial impact and logistics of the relocation or its prevention; and
  - (11) For a temporary order, the amount of time before a final decision can be made at trial. *Id.* at 74-75.

<sup>129</sup> *Momb*, 132 Wash. App. at 80.

<sup>130</sup> *Id.* at 80-81.

<sup>131</sup> *Fredman v. Fredman*, 960 So.2d 52, 56 (2007).

<sup>132</sup> *Id.* at 57.

<sup>133</sup> *Id.*

<sup>134</sup> *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005); *Jaramillo v. Jaramillo*, 113 N.M. 57; 823 P.2d 299 (1991).

of the child while affording protection equally between a majority parent’s right to travel and a minority parent’s right to parent.” In light of the competing constitutional interests, both courts adopt a test that is burden neutral. Both parties must try to convince the court that his or her position is in the child’s best interests, but if either party fails to meet what would typically be his or her burden the court remains free to grant whichever proposal it finds best serves the child’s interests.<sup>135</sup> The Colorado court explained that “both parents share equally the burden of demonstrating how the child’s best interest will be served.”<sup>136</sup> In this way the courts are able to give consideration to the competing fundamental rights and to the child’s best interests by removing any presumptions and burdens; permitting a balancing of all relevant interests and rights.<sup>137</sup>

#### IV. POLICY AND REFORM

It is incumbent on Michigan to reform its law governing relocation in light of the important rights and interests at stake in these cases. Lawmakers should be more sensitive to the fact intensive nature of relocation disputes and redraft the law in a way that will enable courts to gather all relevant information in each case. This approach will increase the likelihood of attaining the best outcome in cases that often seem to be lose-lose situations.

##### A. The Policy of the Best Interests Approach Requires a Standard

Since Michigan, and indeed much of the world, is committed to approaching this delicate area of the law with a focus on the best interests of the child it is necessary for courts to be given the authority to actually make a determination about the best interests of the child in any given case. Currently, the law requires a parent with sole legal custody to petition for permission to change domicile but provides the court, which is required to issue some kind of order, with no

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<sup>135</sup> *Jaramillo*, 113 N.M. at 309.

<sup>136</sup> *Ciesluk*, 113 P.3d at 147 quoting *Jaramillo*, 823 P.2d at 308.

<sup>137</sup> *Fredman*, 960 So.2d at 59 (discussing the Colorado court’s approach to the relocation problem).

standard for evaluation. Judges will either approve the motion without consideration of any facts – deferring completely to the custodial parent’s judgment and ignoring what the interests of the child or other parent may be – or they will attempt to fashion some kind of inquiry.<sup>138</sup> The former approach will leave judges without relevant information and it will fail to adequately consider the best interests of the child and the rights of the other parent. If the latter option is pursued there will be a lack of uniformity in change of domicile determinations throughout the state. Decisions will lack legitimacy since they will not be based in any concrete law and will seem to turn on “what the judge had for breakfast.”<sup>139</sup> Unpredictability may encourage litigation, and put the child through greater stress.

Presumably, the legislature made an exception for parents with sole legal custody because it felt these parents were in a position to make decisions about relocation without the court’s evaluation. This assumption is ostensibly a policy determination predicated upon the premise that parents who are not sole custodians are not involved in the minor child’s life to any significant extent and that the child’s best interests are always served by deferring to what the custodial parent has decided. This myopic and mechanical view fails to consider the realities of custody determination. An award of sole custody to one parent is not a condemnation of the other parent – the sole custody award could have been based on the agreement of the parents, or because the parents could not agree on important medical, legal, and educational decisions thereby necessitating an award of sole custody. Additionally, the parent without any kind of custody may still exercise significant parenting time and be an important part of the child’s life.

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<sup>138</sup> But they will not be able to use the change-of-domicile factors set forth in the statute governing requests made by parents who do not have sole custody since the Michigan Court of Appeals has held that it is error to apply those factors to situations where the petitioning parent has sole legal custody – therefore the court will be forced to avoid examining the very factors the legislature deemed important to making decisions in the relocation context. *See Smead*, 2009 WL 1139263, at \*3; *Spires*, 276 Mich. App. at 435-36.

<sup>139</sup> RONALD DWORKIN, *LAW’S EMPIRE* 36 (1986) (discussing the legal realist movement, and the belief that some judges make decisions arbitrarily and not based upon actual rules of law). The legal realist critique has more force when judges are not provided with coherent rules upon which to base their decisions.

The social science research suggests it is important to a child's later development and adjustment to have a relationship with both parents. This finding militates against a standardless approach automatically approving relocation and thereby separating further a family already struggling to cope with divorce.<sup>140</sup> Researchers have identified situations where relocation benefits may outweigh the risks – but in order to take advantage of this information and use it to further the child's best interests the court must be able to engage in some kind of factual analysis. The best interests of the child will be better served if courts are able to examine each relocation request individually and assess whether on balance the relocation is harmful or beneficial. Allowing the court to conduct an evidentiary hearing will not automatically prevent relocation, nor will it inflict harm upon the child. Custodial parents whose relocation is in the best interests of the child will still be allowed to relocate. Allowing some judicial oversight will prevent relocation that would be harmful to the child; thereby actually protecting the child's best interests.

#### B. Reform Suggestions

Michigan should remove the exception for parents with sole legal custody from the current statutory scheme governing relocation. Lawmakers should fill the statutory gap with a fact specific standard for judges to apply. The standard should be to evaluate the change in domicile motion in light of the child's best interests – this fits in with the rest of the Child Custody Act. Courts should be given a set of factors to apply to petitions made by parents with sole legal custody. These factors should permit the court to gather specific factual information in each case. A blanket assumption is inappropriate for the relocation context since very specific facts and circumstances weigh in favor of or against permitting relocation. The court should use

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<sup>140</sup> See *supra* Section III.A (discussing the social science research on the impact of divorce on children).

the information it gathers from applying the factors to make individualized decisions – in light of the social science research and the specific circumstances – as to the propriety of the relocation.

Lawmakers should devise factors that address the circumstances that social science has identified as most indicative of how the child will adjust to the relocation. Therefore, the judge should be given a standard focused on the best interests of the child that addresses: (1) the age of the child; (2) whether the move is for financial reasons and whether it will move parent out of poverty; (3) how well the child has adjusted to the divorce in general; (4) the ability and willingness of parents to cooperate to facilitate continuing, meaningful, parenting time after the relocation; (5) whether currently the child is in a high conflict situation.<sup>141</sup> Additionally, lawmakers should include a factor that addresses the current quality of the child’s relationship with both parents. If there is no relationship to speak of between the child and the noncustodial parent it would make little sense to deny permission to relocate in order to maintain the child’s bond with both parents.<sup>142</sup>

Neither party should bear the ultimate burden – instead both parents should present all the information each deems relevant and then respond to questions from the judge. The court will be guided by the specific factors touching on the facts that have the most impact on whether or not the move will benefit the child. The court does not explicitly have to weigh the competing interests of the parents<sup>143</sup> because providing the parents with a meaningful hearing focused on the facts affecting the child’s best interests gives each parent’s rights respect. The compelling government purpose justifying interference with fundamental rights is the best interests of the

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<sup>141</sup> “High conflict” refers to serious situations involving violence or extreme mental abuse – it requires more than disagreement between the parents. See Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION COURTS REV. 273, 278-79 (1999)

<sup>142</sup> Because one of the primary reasons social scientists and other advocates have opposed relocation is because of the findings that a child will adjust and develop the best when that child has a close relationship with both parents. Relocation is a threat to a close relationship, but if a close relationship does not exist, perhaps relocation undertaken in good faith should be favored.

<sup>143</sup> See *supra* Part III (discussing the competing interests of the parents).

child; therefore, a hearing seriously considering what those best interests are gives due deference and consideration to all the implicated rights and interests. Additionally, the fact that the standard and factors do not place the burden of proof on either party recognizes that each parent has important rights at stake.

#### CONCLUSION

In conclusion, replacing the exception in Michigan's relocation statute for parents with sole legal custody with specific factors to guide the court furthers the goal of promoting the best interests of the child. Creating a standard focusing on factors known to bear on the child's adjustment and development will bring this part of the relocation law in line with the Child Custody Act's focus on the best interests of the child. Additionally, creating a hearing that is meaningful will give proper recognition to the important rights and interests of parents. Finally, removing the exception and creating a law that provides judges and lawyers guidance in the relocation context will improve the predictability, uniformity, and legitimacy of change of domicile motion hearing orders.