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ARTICLE

RESIDENCE RESTRICTIONS ON CUSTODIAL PARENTS: SEX-BASED DISCRIMINATION?

BY ALIX GRAVENSTEIN PASTIS*

I. INTRODUCTION

Residence restrictions are frequently imposed on the custodial, but not the noncustodial, parent.¹ These restrictions come into play when the custodial parent wishes to move with the child, the noncustodial parent opposes the move, and a court is called upon to resolve the dispute.² The court will do so based upon a determination of what it judges to be in the best interests of the child.³ The best interests inquiry ultimately resolves itself into a question of whether the custodial parent's reasons for making the move are sufficiently substantial to outweigh the noncustodial parent's interest in existing visitation privileges.⁴ A custodial parent who violates the residence restrictions may lose custody of the child,⁵ forfeit child support,⁶ or be subjected to

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1. See *infra* notes 11-21 and accompanying text.

2. See *infra* notes 22-40 and accompanying text.

3. See *infra* notes 42-64 and accompanying text.

4. *Id.*

5. See, e.g., *Courten v. Courten*, 92 A.D. 2d 579, 459 N.Y.S. 2d 464 (1983); *Brandon v. Faulk*, 326 So. 2d 76 (Fla. Dist. Ct. App.), *cert. denied*, 336 So. 2d 104 (Fla. 1976); *Fritschler v. Fritschler*, 60 Wis. 2d 283, 208 N.W.2d 336 (1973). *Cf.* *Giachetti v. Giachetti*, 416 So. 2d 27 (Fla. Dist. Ct. App. 1982) (no change of custody, but injunction restraining removal).

6. See, e.g., *Pattison v. Pattison*, 208 So. 2d 395 (La. Ct. App.), *cert. denied*, 252 La. 168, 210 So. 2d 52 (1968); *Ryan v. Ryan*, 300 Minn. 244, 216 N.W.2d 912 (1974). *Cf.*

contempt proceedings.⁷

In today's highly mobile society, residence restrictions create two forms of post-divorce inequality for women because the custodial parent is usually the mother.⁸ First, there is a disparate impact on women because only the custodial parent is burdened with residence restrictions. The noncustodial parent, usually the father, remains free to relocate at will. Second, the so-called "best interests" standard permits the court to interject personal values that are frequently sex-biased, into the decision to permit or deny relocation. Yet even assuming that residence restrictions are grounded in sex-neutral justifications, they have a disparate impact on women that reinforces a traditional sex-based hierarchy; they effectively grant the noncustodial father the power to veto a proposed move unless the custodial mother can show "substantial" reasons to legitimate her decision to move.

Residence restrictions are disturbing not only because of the potential for sex discrimination, but also because of the harm they entail for all involved. Custodial mothers are often able to fulfill their desire to move to join a new husband⁹ or accept a new job¹⁰ only at the risk of losing custody of their child. The personal, emotional, or economic harm to the custodial mother may not always be obvious. She may simply forego an opportu-

D'Onofrio v. D'Onofrio, 144 N.J. Super. 200, 365 A.2d 27 (Ch. Div.), *aff'd*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976) (move allowed but child support reduced).

7. *See, e.g.*, Pattison v. Pattison, 208 So. 2d 395 (La. Ct. App.), *cert. denied*, 252 La. 168, 210 So. 2d 52 (1968); Entwistle v. Entwistle, 61 A.D.2d 380, 401 N.Y.S.2d 213 (1978).

8. *See* J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP (1980).

9. *See In re Marriage of Smith*, 290 Or. 567, 624 P.2d 114 (1981); Giachetti v. Giachetti, 416 So. 2d 27 (Fla. Dist. Ct. App. 1982) (where permission to move was denied). *But see* Martinez v. Konczweski, 85 A.D.2d 717, 445 N.Y.S.2d 844 (1981), *aff'd*, 57 N.Y.2d 809, 441 N.E.2d 1117, 455 N.Y.S.2d 599 (1982); Pattison v. Pattison, 208 So. 2d 395 (La. Ct. App.), *cert. denied*, 252 La. 168, 210 So. 2d 52 (1968) (where permission to move was granted).

10. *See, e.g.*, Priebe v. Priebe, 81 A.D.2d 746, 438 N.Y.S.2d 413 (1981), *aff'd*, 55 N.Y.2d 997, 434 N.E.2d 708, 449 N.Y.S.2d 472 (1982); Weiss v. Weiss, 76 A.D.2d 863, 428 N.Y.S.2d 506 (1980), *aff'd*, 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981) (where the move was denied). *Cf.* Helentjaris v. Sudano, 194 N.J. Super. 220, 476 A.2d 828 (App. Div. 1984); Bernick v. Bernick, 31 Colo. App. 485, 505 P.2d 14 (1972) (mother obtained gainful employment 140 miles from her former husband's home). *But see* Jafari v. Jafari, 204 Neb. 622, 284 N.W.2d 554 (1979); Tandy v. Tandy, 42 Ill. App. 3d 87, 355 N.E.2d 585 (1976) (where the trial court gave permission to move and was affirmed on appeal).

nity that requires relocation under the belief that a residence restriction requires it; she may bargain away the noncustodial parent's financial obligations such as child support to avoid litigation or the effect of an adverse decision after trial.

The potential for harm does not end with the state's intervention into the custodial mother's personal decision making. Men, particularly noncustodial fathers, can also be harmed. A noncustodial father's contact with his child could be permanently denied or crippled because a custodial mother faced with limited, high-cost options might secretly move and conceal the child's whereabouts to circumvent the restriction. Men are also harmed when they marry women with children from a prior marriage. Such men may be faced with two unpalatable options: foregoing a relationship with a woman burdened by a residence restriction or assuming the burden themselves. Finally, if current residence restriction analysis is applied to custodial fathers on an equal basis they could obviously be harmed in the same way as custodial mothers.

Of course, the ultimate loser in a dispute of this nature is the child of the divorced couple. He or she could not be left unscathed by a parental dispute that rises to the level of requiring judicial intervention or circumvention of the legal process.

This Article will generally refer to the custodial parent as "mother" and the noncustodial parent as "father" because that describes the typical alignment of the parties and highlights the sex discrimination issues. The term "child" will be used regardless of how many children are involved because the analysis does not turn on the number of children. This Article will demonstrate that residence restrictions are not consistent with concepts of custody and general rules on change of custody. And, it will show that residence restrictions are sex-based in their application, justification, and effect because they exist to protect only the interests of the noncustodial father. If most custodial parents were men, residence restrictions would cease to exist or would be analyzed differently; the focus would finally be on the real interests at stake for all involved.

II. RESIDENCE RESTRICTIONS AND THEIR OPERATION

A. NATURE AND SOURCE OF RESIDENCE RESTRICTIONS

Restrictions on relocation of the mother can be imposed by statute,¹¹ a separation agreement,¹² a divorce decree,¹³ or in a post-divorce proceeding. A post-divorce proceeding may take one of several forms: a petition for modification of the decree to prohibit removal,¹⁴ a request for injunctive relief to restrain relocation to protect visitation privileges in the divorce decree,¹⁵ a petition for change of custody under the theory that the move is a "change of circumstances" warranting such an extreme measure,¹⁶ or a combination of these devices.¹⁷ These are often initiated by the mother's petition for removal¹⁸ or for modification of the residence restriction or visitation privilege.¹⁹ Such restrictions may prohibit the mother from making an intrastate²⁰ or an

11. See, e.g., MINN. STAT. § 518.175(3)(1982); N.J. STAT. ANN. §9:2-2 (West 1976).

12. Restrictions may be negotiated in a settlement agreement. Because their interpretation is governed in part by questions of merger and contract law, relocation decisions based on an interpretation of such agreements are beyond the scope of this Article.

13. See, e.g., *Henry v. Henry*, 119 Mich. App. 319, 326 N.W.2d 497 (1982); *Helentjaris v. Sudano*, 194 N.J. Super. 220, 476 A.2d 828 (App. Div. 1984). *Accord Jafari v. Jafari*, 204 Neb. 622, 284 N.W.2d 554 (1979) (restrictions imposed in decree of dissolution).

14. See, e.g., *Bernick v. Bernick*, 31 Colo. App. 485, 505 P.2d 14 (1972); *In re Marriage of Lower*, 269 N.W.2d 822 (Iowa 1978).

15. See, e.g., *Scheiner v. Scheiner*, 336 So. 2d 406 (Fla. Dist. Ct. App. 1976), *cert. denied*, 342 So. 2d 1103 (Fla. 1977); *Weiss v. Weiss*, 76 A.D.2d 863, 428 N.Y.S.2d 506 (1980), *aff'd*, 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981).

16. See, e.g., *Gunter v. Gunter*, 93 Ill. App. 3d 1043, 418 N.E.2d 149 (1981); *In re Marriage of Smith*, 290 Or. 567, 624 P.2d 114 (1981).

17. See, e.g., *In re Marriage of Martinis*, 51 Or. App. 861, 627 P.2d 504 (1981) (motion for change of custody or restraining order); *In re Marriage of Lower*, 269 N.W.2d 822 (Iowa 1978) (petition for change of custody or residence restrictions).

18. See, e.g., *Burich v. Burich*, 314 N.W.2d 82 (N.D. 1981); *Arquilla v. Arquilla*, 85 Ill. App. 3d 1090, 407 N.E.2d 948 (1980).

19. See, e.g., *Brandon v. Faulk*, 326 So. 2d 76 (Fla. Dist. Ct. App.), *cert. denied*, 336 So. 2d 104 (Fla. 1976); *In re Marriage of Lower*, 269 N.W.2d 822 (Iowa 1978).

20. See, e.g., *Lebowitz v. Lebowitz*, 403 S.W.2d 871 (Tex. Civ. App. 1966) (trial court decision restricting residence to local county in divorce decree was reversed as abuse of discretion and modified to restrict residence to state); *Bernick v. Bernick*, 31 Colo. App. 485, 505 P.2d 14 (1972) (trial court granted father's motion to prohibit relocation within state but 140 miles from father's home); *Cheatham v. Cheatham*, 344 So. 2d 525 (Ala. Civ. App. 1977) (restriction of residence to 50-mile radius unreasonable); *Groh v. Groh*, 110 Wis. 2d 117, 327 N.W.2d 655 (1983) (court lacked power to make order requiring mother to relocate 235 miles within state); *Helentjaris v. Sudano*, 194 N.J. Super. 220, 476 A.2d 828 (App. Div. 1984) (error to condition continued custody on mother's return to state and residence within a 40-mile radius of father).

interstate²¹ move with the child without first obtaining permission from either the court or the father, regardless of her reasons for wanting to move.

A mother may want or need to move in order to fulfill her obligations to support and rear her child.²² Her desire to move may also be affected by other considerations that benefit the child by furthering the mother's personal interests.²³ For example, if she marries a nonresident of the jurisdiction, the couple may decide it is in the new family's interest to live in his state rather than in hers.²⁴ The prospect of employment for herself,²⁵ her new spouse,²⁶ or her fiancé²⁷ may motivate the proposed move. She may wish to move closer to relatives in order to gain assistance with the upbringing of the child, or for emotional support after divorce.²⁸ Her health²⁹ or the child's³⁰ may motivate a desire to move. Educational opportunities may not be available locally.³¹ She may view the move as necessary to establish a new life for herself apart from her ex-husband,³² to avoid post-

21. See *supra* notes 9 & 10.

22. See, e.g., *Gottschall v. Gottschall*, 210 Neb. 679, 316 N.W.2d 610 (1982); *Tanttila v. Tanttila*, 152 Colo. 446, 382 P.2d 798 (1963); *Groh v. Groh*, 110 Wis. 2d 117, 327 N.W.2d 655 (1983). See also *infra* notes 65-69 and accompanying text, discussing responsibilities imposed upon the custodial parent.

23. See, e.g., *In re Marriage of Burgham*, 86 Ill. App. 3d 341, —, 408 N.E.2d 37, 40 (1980) (child was indirectly benefited by allowing move because custodian was happier); *In re Marriage of Gutermuth*, 246 N.W.2d 272, 275 (Iowa 1976) (move would make mother a happier person and better parent).

24. See *supra* note 9.

25. See *supra* note 10.

26. See, e.g., *In re Marriage of Feliciano*, 103 Ill. App. 3d 666, 431 N.E.2d 1120 (1981); *Martinez v. Konczewski*, 85 A.D.2d 717, 445 N.Y.S.2d 844 (1981), *aff'd*, 57 N.Y.2d 809, 441 N.E.2d 1117, 455 N.Y.S.2d 599 (1982).

27. See, e.g., *Garland v. Garland*, 19 Ill. App. 3d 951, 312 N.E.2d 811 (1974); *Gottschall v. Gottschall*, 210 Neb. 679, 316 N.W.2d 610 (1982).

28. See, e.g., *In re Marriage of Young*, 529 P.2d 344 (Colo. Ct. App. 1974); *Brown v. Brown*, 261 Iowa 591, 155 N.W.2d 426 (1968); *Klein v. Klein*, 93 A.D.2d 807, 460 N.Y.S.2d 607 (1983).

29. See, e.g., *Fritschler v. Fritschler*, 60 Wis. 2d 283, 208 N.W.2d 336 (1973); *Abraham v. Abraham*, 44 A.D.2d 675, 353 N.Y.S.2d 794 (1974).

30. See, e.g., *Tandy v. Tandy*, 42 Ill. App. 3d 87, 355 N.E.2d 585 (1976); *In re Marriage of Feliciano*, 103 Ill. App. 3d 666, —, 431 N.E.2d 1120, 1125 (1981). *But see* *Dozier v. Dozier*, 167 Cal. App. 2d 714, 334 P.2d 957 (1957) (move denied where child's asthma and pneumonia attacks would be aggravated).

31. See, e.g., *Middlekauff v. Middlekauff*, 161 N.J. Super. 84, 390 A.2d 1202 (App. Div. 1978); *Harris v. Harris*, 57 Misc. 2d 672, 293 N.Y.S.2d 592 (Fam. Ct. 1968).

32. See, e.g., *Fritschler v. Fritschler*, 60 Wis. 2d 283, 208 N.W.2d 336 (1973); *Broomfield v. Broomfield*, 283 So. 2d 839 (La. Ct. App. 1973); *In re Marriage of Gutermuth*, 246 N.W.2d 272, 275 (Iowa 1976).

divorce tensions,³³ or to make a "fresh start" and establish her authority as head of the post-divorce family unit.³⁴ Of course, the motivating reason may also be a conscious intent to frustrate visitation.³⁵ In contrast to the number and variety of reasons that might individually or collectively motivate the mother's desire to move, the father's interests in resisting the move are much more circumscribed.

At best, the father opposes relocation to protect the child from specific harm³⁶ or to preserve presently exercised visitation privileges by keeping the child near the father's residence.³⁷ Increased distance may curtail or, in extreme circumstances, eliminate visitation because of work or economic constraints. Non-financial considerations, such as new marital obligations, may also diminish the opportunity to visit over greater distances. Qualitatively, alternative arrangements may not be comparable to existing arrangements for nurturing a parent-child relationship. Thus, even where the mother bears part of the expense associated with long distance visitation, existing visitation may be diminished.

On the other hand, a father may resist relocation simply as a matter of marginal inconvenience where, for example, he is not currently fully exercising existing opportunities for visitation or has, himself, previously relocated farther away.³⁸ On an even less benign level, he may challenge the move simply to gain bargaining leverage to reduce child support or other financial obligations,³⁹ or to spite the mother. When the father is required to

33. See, e.g., *In re Marriage of Gutermuth*, 246 N.W.2d 272 (Iowa 1976).

34. Note, *The Judicial Role in Post-Divorce Child Relocation Controversies*, 35 STAN. L. REV. 949, 951 (1983)[hereinafter cited as Note, *Judicial Role*].

35. *In re Denberg*, 34 Misc. 2d 980, 986, 229 N.Y.S.2d 831, 837 (Sup. Ct. 1962).

36. See, e.g., *Gunter v. Gunter*, 93 Ill. App. 3d 1043, 418 N.E.2d 149 (1981) (mother's bigamous remarriage and threat of physical harm to child); *Dozier v. Dozier*, 167 Cal. App. 2d 714, 334 P.2d 967 (1959) (child's health).

37. See, e.g., *Priebe v. Priebe*, 81 A.D.2d 746, —, 438 N.Y.S.2d 413, 414 (1981) (forty-five percent of time spent with child); *Jafari v. Jafari*, 204 Neb. 622, —, 284 N.W.2d 554, 555 (1979) (daily visits).

38. See, e.g., *In re Marriage of Burgham*, 86 Ill. App. 3d 341, —, 408 N.E.2d 37, 38 (1980) (after divorce, father moved to Virginia and then New York, but successfully opposed mother's move to California at the trial level); *Gray v. Gray*, 57 Ill. App. 3d 1, —, 372 N.E.2d 909, 911-12 (1978) (father had moved intrastate and visits were reduced from weekends to "perhaps" once a month; trial court denied permission for mother's move, reversed on appeal).

39. See *infra* notes 62-64 and accompanying text.

pay child support, he may feel the *quid pro quo* is a right to convenient visitation and a right to exercise some authority in a situation where he is otherwise powerless. "The lack of authority or clearly defined value has a particularly demeaning significance for fathers [I]t is especially hard for the outside father to be stripped of rank and command and yet be expected to provide financial support."⁴⁰

Because either a request for permission to move or a residence restriction violation frequently result in a change of custody at the father's request,⁴¹ the operation of residence restrictions will be examined and criticized in light of the burden that this type of "traditional" restriction places on the mother's freedom to move.

B. OPERATION OF THE "TRADITIONAL" RESIDENCE RESTRICTIONS

Once a residence restriction case is brought before the court, the court decides according to what it perceives to be in the "best interests of the child," or, in a few jurisdictions, the "best interests of the post-divorce custodial family unit."⁴² The court exercises a breadth of discretion under either standard which is subject to few restraints. The trial court is often not required to make findings of fact, to write an opinion, or to reconcile the case with precedent.⁴³ In general, an appellate court will not reverse unless the trial court's decision was clearly erroneous. Under such circumstances, the ability to determine when a court has acted upon an inappropriate factor is necessarily limited. Yet, many decisions are reversed on appeal because the court used an improper burden of production⁴⁴ or gave the evidence

40. Note, *Judicial Role*, *supra* note 34, at 952 n.14 (quoting M. HUNT & B. HUNT, *THE DIVORCE EXPERIENCE* 181-82 (1977)).

41. *See supra* note 5.

42. *See infra* notes 55-64 and accompanying text. *See also infra* notes 123-30 discussing the nature of the physical and psychological interests of the child.

43. *See* Mnookin, *Child Custody Adjudication; Judicial Functions in the Face of Indeterminacy*, 39 *LAW & CONTEMP. PROBS.* 226, 253-54 (Summer 1975).

44. *See* Henry v. Henry, 119 Mich. App. 319, 322, 326 N.W.2d 497, 499 (1982) (mother must meet *D'Onofrio* standard, not statutory "best interests" factors because court would have to reconsider factors previously considered in awarding custody that are likely to be inappropriate in a removal hearing). *Cf.* Auge v. Auge, 334 N.W.2d 393, 399 (Minn. 1983) (motion by the mother to relocate shall be granted unless opposing party establishes by a preponderance of the evidence that the move is not in the best interests of the child).

improper weight under the best interests standard.⁴⁵ As will be shown below, the reported cases demonstrate the sex-biased values that underlie a court's decision in the allocation of the burden of production and the nature of the standard of proof.

1. *Burden of Production*

Courts use presumptions affecting the burden of production to assist in their decisions under the best interests standard. Some jurisdictions recognize presumptions favoring the mother's right to move under the theory that it is generally in the best interests of the child to remain with the custodial parent because it promotes continuity with the primary caretaker⁴⁶ and the child's sense of security.⁴⁷ However laudable this presumption may appear, the advantage it affords the mother in litigation is illusory.

Because the presumption benefiting the mother is an advantage only after judicial intervention, she still must spend the time and incur the expense of litigating the matter. In order to meet her burden of persuasion under the best interests inquiry, she must show a substantial reason to legitimate her move.⁴⁸ Even if the court ultimately allows the move, her success may be undercut by a reduction in child support or a requirement to defray the father's increased costs of visitation.⁴⁹ Finally, there

45. See, e.g., *Weber v. Weber*, 84 A.D.2d 940, 446 N.Y.S.2d 676 (1981) (where mother married an out-of-state resident, it was error to deny permission to relocate); *Middlekauff v. Middlekauff*, 161 N.J.Super. 84, ___, 390 A.2d 1202, 1206 (App. Div. 1978) (where the mother sought to further her education and had made detailed arrangements for the child, it was error to deny removal based on finding that living in Manhattan would not be as conducive to the welfare of the child as living in a New Jersey suburb). Cf. *Brown v. Brown*, 261 Iowa 591, 155 N.W. 2d 426 (1968) (where testimony related entirely to effect move would have on the mother and did not refer to the child except to suggest that the move would allow the mother to be "better able to do things for the kids," it was error to permit removal).

46. See, e.g., *Klein v. Klein*, 93 A.D.2d 807, 460 N.Y.S.2d 607 (1983).

47. See, e.g., *Auge v. Auge*, 334 N.W.2d 393, 399 (Minn. 1983); *Bernick v. Bernick*, 31 Colo. App. 485, 487-88, 505 P.2d 14, 15 (1972); *Cheatham v. Cheatham*, 344 So. 2d 525, 527 (Ala. Civ. App. 1977).

48. See, e.g., *In re Marriage of Gutermuth*, 246 N.W.2d 272, 274 (Iowa 1976) (mother found to have burden of proof and permission to move granted); *In re Marriage of Lower*, 269 N.W.2d 822, 825-26 (Iowa 1979) (burden of proof on mother and permission to move granted).

49. See, e.g., *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, ___, 365 A.2d 27, 33 (Ch. Div. 1976) (child support reduced); *Burich v. Burich*, 314 N.W.2d 82, 84 (N.D. 1981)

is always the risk that the court will reject the presumption that it is in the best interests of the child to remain with the mother, and adopt the more common presumption that favors the father:⁵⁰ that frequent and regular visitation best serve the child's interests.⁵¹ The underlying notion reflects a preference for maintaining the status quo, "since any change would be from known conditions proven to be conducive to the child's welfare to surroundings . . . in the nature of an experiment which should not be made."⁵² The court in *O'Neil v. Koch*⁵³ was more candid in stating the true premise as "proper to emphasize the father-[child] relationship since he is the parent who stands to lose contact with the child against his will if removal is approved."⁵⁴ This premise reflects the view that the mother should be held responsible for the consequences of her own willful actions and the father deserves sympathy when actions are forced upon him against his will. Such a view, however, does not reflect the true nature of the post-divorce interests involved. This view not only abrogates judicial responsibility to decide what is in the best interests of the child, but also calls attention to the sex discrimination issues.

2. *Standard of Proof*

In most jurisdictions, the court makes the decision about whether or not to allow the mother to move with the child supposedly so as to promote the so-called "best interests" of the

(mother required to pay travel expenses of child to and from North Dakota for six-weeks summer visitation); *Broomfield v. Broomfield*, 283 So. 2d 839, 840 (La. Ct. App. 1973) (costs of transporting child from California to Louisiana divided equally between the parents for eight-weeks summer visitation where mother moved to improve her wages from \$75 to \$125 per week); *Martinez v. Konczewski*, 85 A.D.2d 717, 445 N.Y.S.2d 844, (1981), 5 N.Y.2d 809, 441 N.E.2d 1117, 445 N.Y.S.2d 599 (1982) (mother required to pay father's travel to Florida and child's travel to New York).

50. *Compare* *Tandy v. Tandy*, 42 Ill. App. 3d 87, 355 N.E.2d 585 (1976) (burden on father) *with* *Arquilla v. Arquilla*, 85 Ill. App. 3d 1090, 407 N.E.2d 948 (1980) (burden on mother to show real advantage to herself and child). *But compare* *Tanttila v. Tanttila*, 152 Colo. 446, 382 P.2d 798 (1963) (burden on party seeking removal which was the mother; regular visits presumed preferable to long visits at father's expense) *with* *Bernick v. Bernick*, 31 Colo. App. 485, 505 P.2d 14 (1972) (presumption that mother as custodial parent made decision in attempt to meet best interest of child).

51. *See* *Weiss v. Weiss*, 52 N.Y.2d 170, 176, 418 N.E.2d 377, 380-81, 436 N.Y.S.2d 862, 865-66 (1981).

52. *Brown v. Brown*, 261 Iowa 591, —, 155 N.W.2d 426, 428 (1968).

53. 10 FAM. L. REP. (BNA) 1207 (Wis. Ct. App. 1983).

54. *Id.*

child.⁵⁵ However, the court usually does not focus on the welfare of the child; its focus is on the competing parental "rights." The decisions usually juxtapose the father's visitation privilege against the mother's reasons for moving.⁵⁶ The heavy evidentiary burden that this standard places on the mother is typified by the stringent New York "exceptional circumstances" test.⁵⁷

In New York, a mother must show a unique or firm job offer, exceptional health or educational needs, or a "dramatic" change of locale which was necessitated by a new marriage.⁵⁸ Anything short of these exceptional needs may result in denial of permission to move and a temporary or permanent change of custody.⁵⁹ This burden is only marginally different from the burden imposed in New Jersey under *D'Onofrio v. D'Onofrio*,⁶⁰ a decision which is gaining acceptance in a number of jurisdictions.⁶¹

55. See generally H. CLARK, LAW OF DOMESTIC RELATIONS 572 (1968).

56. See Comment, *Post-Divorce Visitation: A Study in the Deprivation of Rights*, 27 DE PAUL L. REV. 113, 118 (1977) [hereinafter cited as Comment, *Deprivation of Rights*]. The "best interests" standard has been roundly criticized as giving the court no substantive guide lines and the opportunity to disguise the real basis for decision. See, e.g., J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1979); Henzey, *Visitation by a Non-Custodial Parent: What is the Best Interests Doctrine?*, 15 J. FAM. L. 213 (1976-1977); Uviller, *Father's Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107 (1978); Mnookin, *supra* note 43.

57. See *Weiss v. Weiss*, 52 N.Y.2d 170, 176-77, 418 N.E.2d 377, 380-81, 436 N.Y.S.2d 862, 865-66, (1981) (citing *Strahl v. Strahl*, 49 N.Y.2d 1036, 407 N.E.2d 479, 429 N.Y.S.2d 636 (1980) where the "exceptional circumstances" test was created in the context of a relocation controversy between parents who had joint custody). Because of the different assumptions upon which joint custody is based, joint custody relocation controversies are not considered in this Article, nor should they have any controlling influence in context of traditional custody.

58. *Id.*

59. See, e.g., *Priebe v. Priebe*, 81 A.D.2d 746, 438 N.Y.S.2d 413, 414 (1981) (temporary custody given father until mother relocated to New York where prescribed visitation could be carried out; mother's showing of limited employment in her field in the local area and a job already obtained out of state was not an exceptional circumstance which could sustain petition to have limited support increased); *Courten v. Courten*, 92 A.D.2d 579, —, 459 N.Y.S.2d 464, 464 (1983) (transfer of custody to father, inability to find suitable employment in New York and opportunity to build better life in California because of a better job offer there were not a compelling showing of exceptional circumstances).

60. 144 N.J. Super. 200, 365 A.2d 27 (Ch. Div.), *aff'd*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976).

61. See, e.g., *Auge v. Auge*, 334 N.W.2d 393, 398 (Minn. 1983) (*D'Onofrio* approved, but burden of persuasion on noncustodial parent); *Henry v. Henry*, 119 Mich. App. 319, 323, 326 N.W.2d 497, 499 (1982) (*D'Onofrio* standard adopted); *Arquilla v. Arquilla*, 85 Ill. App. 3d 1090, —, 407 N.E.2d 948, 950 (1980) (*D'Onofrio* followed); *Burich v. Burich*,

The *D'Onofrio* standard requires the mother to show that the move will provide a "real advantage" to the new family unit: herself *and* the child.⁶² In applying the standard, the court must consider four determinative factors: (1) whether there is a "likely capacity" that the move will improve the quality of life for both the mother and the child; (2) whether the mother's primary motive in moving is to frustrate visitation; (3) whether the father is resisting the move in order to decrease existing support obligations; and (4) whether adequate visitation alternatives exist and whether the mother will comply with them.⁶³

The facts of *D'Onofrio* cast doubt on the real importance of evaluating the individual factors. For example, the court recognized that the father had not fully exercised his visitation privileges, in spite of the mother's encouragement, and that he had no objection to the move, provided that the mother was willing to forego the weekly child support of forty dollars for two children. In spite of his visitation record and admitted self-serving motive in resisting the move, the court allowed the move but reduced the child support by fifteen dollars to enable the father to pay for transportation for visitation.⁶⁴ This clearly undercut any "real advantage" to the new family unit. Reduction of child support, in order to enable visitation, reflects a value preference for the father's potential interests even above the child's needs. Thus, the *D'Onofrio* "real advantage" test under the best interests inquiry is ultimately no more predictable or value-neutral than similar analyses in jurisdictions that have not adopted any "test."

On the positive side, the *D'Onofrio* test clarifies what the court is balancing under the "best interests of the child" standard and it specifically requires the court to consider at least one of the less benign motives for resisting the move. On the other hand, it enlarges the "best interests" inquiry because it appears to permit the court to deny a move that apparently is not in the *mother's* best interests.

In short, both the New York and New Jersey tests exem-

314 N.W.2d 82, 84 (N.D. 1981) (cited *D'Onofrio* with approval).

62. *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, ___, 365 A.2d 27, 30 (Ch. Div. 1976).

63. *Id.*

64. *Id.* at ___, 365 A.2d at 32-33.

plify the difficult standard of proof that the mother must meet in order to avoid a loss of custody. Both the allocation of the burden of production and the application of the illusory "best interests" standard in "traditional" residence restriction analysis admit value preferences that may not be sex-neutral. Because of the severe burdens that these restrictions place on the mother, they should be abandoned unless they in fact operate and can be justified on a sex-neutral basis.

III. CRITIQUE OF "TRADITIONAL" RESIDENCE RESTRICTIONS

If residence restrictions are in fact geared to protect the best interests of the child, residence restriction analysis should comport with traditional notions of custody and rules on change of custody; they should be applied on an equal basis to all custodial parents regardless of sex, and the state's interests in imposing and enforcing residence restrictions should be sex-neutral and logically furthered by such restrictions. Yet, the realities of the purposes, the actual implementation and the effect of residence restrictions are unsupported on grounds other than sex because they are contrary to concepts of custody and general rules on change of custody, and are sex-based in application and justification.

A. RESIDENCE RESTRICTIONS ARE CONTRARY TO CONCEPTS OF CUSTODY AND GENERAL RULES ON CHANGE OF CUSTODY

1. *Custody*

When the traditional family unit has broken down, the court awards custody of the child to the parent it deems best qualified to protect and further the child's best interests, who is usually the mother.⁶⁵ The custody award implicitly, if not explicitly, requires the mother to assume the prior collective responsibilities of both parents to supervise, educate, support and care for the child.⁶⁶ She thus becomes head of the post-divorce family unit with broad powers and responsibilities to care for and rear

65. See generally H. CLARK, *supra* note 55, at 573-96; J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 56, at 19.

66. See H. CLARK, *supra* note 55, at 573-74.

the child; the noncustodial father usually retains visitation privileges and duty to assist in the financial support of the child.⁶⁷

The state ordinarily will not interfere in ongoing family decision making to impose one method of child rearing over another, except where the child is threatened with physical harm or the legislature has fixed the state policy, such as compulsory school laws.⁶⁸ This posture reflects a policy of family autonomy, a recognition that parents require authority to carry out parental responsibilities, and a recognition that the family unit is best able to protect the child's welfare in both the traditional and post-divorce family.⁶⁹ However, these principles of family autonomy evaporate in the context of residence restrictions.

When the traditional family unit is intact, the state will not question a family decision to relocate because implicitly the child's interests are adequately protected by the family. The same result should obtain when the post-divorce family decides to move because the award of custody creates a new family unit necessarily predicated upon the mother's ability to protect the best interests of the child; principles of custody and family autonomy are contrary to the imposition of residence restrictions. There is no greater need for the court to substitute its judgment of what will serve the best interests of the child in the post-divorce family unit than in the traditional family setting.

The court won't second guess a post-divorce family's decision to move *locally* although the move may equally impair the child's interests by necessitating a change in schools or the like. Challenges to intrastate moves are rarely successful.⁷⁰ Where an interstate move is permitted, the mother has implicitly provided adequate protection of the child's welfare.⁷¹ Thus, there is no good reason to believe that she can not protect the child in *all* relocation situations. Judicial intervention on the child's behalf is simply contrary to the basic concept of custody.

67. *Id.*

68. *Id.* at 574-76.

69. *Id.*

70. *See supra* note 20.

71. *See Appendix* for a sampling of case dispositions from various jurisdictions on the issue of removal.

Because state intrusion into the post-divorce family unit's decision to move is inconsistent with accepted notions of custody and family autonomy, it is inexplicable on grounds other than sex. Moving restrictions are imposed and enforced only at the behest of the father; that is, only if he feels either that his ability to judge what is in the best interests of the child is superior to the mother's, or that his interests in visitation are superior to the mother's interests in moving. When the court intrudes under either proposition, it implicitly rejects the rationale of the custody decision and gives judicial approval to the continued subordination of women, unless the circumstances would otherwise meet the requirements for a change of custody.

2. *Change of Custody*

Generally when a father petitions the court for a change of custody, he is required to show a "substantial change of circumstances affecting the welfare of the child."⁷² The father bears a heavy burden of persuasion due to judicial reluctance to change the status quo. This judicial attitude arises out of an awareness of the inherent potential for harm to the child from a modification of custody, and a concern for the policies favoring the finality of judgments and opposing relitigation of matters already determined.⁷³ Therefore, to comport with the normal rules on change of custody in a residence restriction controversy, the father should have both the burden of production and the burden of persuading the court that the mother's move is not in the best interests of the child.

In *Garland v. Garland*,⁷⁴ the mother wanted to move with the child to join her fiance and obtain a new job.⁷⁵ The court rejected the father's petition for change of custody⁷⁶ and his claim of sexual bias in the allocation of the burden of proof:

[W]hile it is true that [the father] was confronted here with a presumption of the continuing validity of the custody provisions [created by the bur-

72. See generally H. CLARK, *supra* note 55, at 598-601.

73. *Id.*

74. 19 Ill. App. 3d 951, 312 N.E.2d 811 (1974).

75. *Garland*, 19 Ill. App. 3d 951, 312 N.E.2d 811.

76. *Id.* at —, 312 N.E.2d at 815 (the father argued sex-bias in favor of women because the court presumed his former wife was better able to care for their child and thus awarded her custody).

den and standard of proof], the presumption operates to protect the welfare of the children by preserving the *status quo* regardless of which parent has custody. To that extent, it is neither constitutionally prohibited nor sexually discriminatory Furthermore, although [there was expert testimony] that the separation of the children from the father would be more traumatic than to most children because of their apparent closeness, we believe that the evidence indicates both were good parents and, under such circumstances, a separation from either would be traumatic.⁷⁷

On the other hand, in *Gunter v. Gunter*,⁷⁸ the father was granted a change of custody against the mother's removal petition because he proved that the mother had entered into a bigamous marriage and the child was threatened with physical harm from the new spouse.⁷⁹ Both of these cases demonstrate how the general rules on change of custody should operate in a residence restriction controversy. The more common approach puts the entire burden of proof on the mother to show that the move is in the best interests of the child, contrary to the general rules governing changes of custody.

For example, in *Courten v. Courten*,⁸⁰ a transfer of custody to the father was upheld upon a finding that the mother's move to find suitable employment was insufficient reason to justify interference with the father's visitation rights; the court deemed the mother's efforts to find work locally "unimpressive."⁸¹ The court found that residence with the father, with liberal visitation by the mother, was in their four-year-old daughter's best interests.⁸² The court did not discuss the general rules on change of custody; it merely held that a disruption of the relationship between the *father* and the child would not be permitted absent a

77. *Id.*, at ____, 312 N.E.2d at 814. Accord *Cheatham v. Cheatham*, 344 So. 2d 525, 527-28 (Ala. Civ. App. 1977); *In re Marriage of Gutermuth*, 246 N.W.2d 272, 274 (Iowa 1976).

78. 93 Ill. App. 3d 1043, 418 N.E.2d 149 (1981).

79. *Id.*

80. 92 A.D.2d 579, 459 N.Y.S.2d 464 (1983).

81. *Id.*

82. *Id.*

compelling showing of “exceptional circumstances” by the mother.⁸³ The court did not consider the disruption of the relationship between the *mother* and the child that would result from a change of custody.

In another case, a mother argued that denial of permission to move the child in order to join her new husband was tantamount to a change of custody order, and that the proceeding should, therefore, be governed by the change of custody rules that require the father to prove a substantial change of circumstances affecting the welfare of the child.⁸⁴ The court rejected the mother’s argument because it deemed the case to be a removal hearing controlled by the best interests standard.⁸⁵ It explained that any resulting change of custody was not caused by a denial of permission to move the child; the mother was not bound to follow her new husband—her decision to do so was voluntary.⁸⁶

In a similar vein, a father sought to bar his ex-wife’s move to join her second husband and relatives by petitioning for a change of custody or a modification of the custody orders to prohibit removal.⁸⁷ The court denied the change of custody, but issued a restraining order to enjoin removal even though the father was unable to show a substantial change of circumstances.⁸⁸ The court held that such a showing was not necessary where the father was really just seeking to enforce the implicit restriction on moving created by the visitation rights in the custody orders.⁸⁹ In any event, the court observed that the mother was not without a remedy because she could seek a modification of the custody orders if *she* could satisfy the substantial change of circumstances and the best interests tests.⁹⁰

These cases are representative of the mainstream approach to traditional residence restriction analysis. As such, they demonstrate a departure from the factors and policies usually

83. *Id.*

84. *O’Neil v. Koch*, 10 FAM. L. REP. (BNA) 1207 (Wis. Ct. App. 1983).

85. *Id.*

86. *Id.*

87. *Giachetti v. Giachetti*, 416 So. 2d 27 (Fla. Dist. Ct. App. 1982).

88. *Id.* at 29.

89. *Id.*

90. *Id.* at 30.

considered important in change of custody litigation. These departures implicate the same lack of sex-neutrality noted in the departures from the general concepts of custody and family autonomy in residence restriction controversies: the father's post-divorce interests are superior to the mother's although she bears the day-to-day responsibilities of custody. This observation is further reinforced by an analysis of the hierarchy of factors that influence the court's best interests determination.

B. RESIDENCE RESTRICTIONS ARE SEX-BASED IN APPLICATION

Viewed objectively, there should be no requirement for the court to inquire into the mother's reasons for moving. The court has already determined that it is in the best interest of the child that he or she remain with the mother when it made the custody award. It should follow that the child goes wherever the mother goes unless the father can meet the burden of proving that a change of custody is required. A potential impairment of visitation⁹¹ should limit the court's investigation to a determination of what alternative visitation arrangements are feasible; it should not open the door to a broader intrusion into the new family's autonomy. However, the court does not confine its inquiry to alternative visitation arrangements. Instead, the mother is required to explain or justify her reasons for moving to the court.

A court is more likely to accept the reasons the mother offers for the move if they are based upon an objectively demonstrable fact such as remarriage or a new job already secured by the mother or her new husband outside the jurisdiction.⁹² As her reasons become more subjective, her likelihood of success diminishes. In such cases, the court may view her motives as unclear, trivial,⁹³ or spiteful⁹⁴ and therefore deny the move. Regardless of

91. See *infra* notes 137-54 and accompanying text.

92. See *supra* notes 24-26.

93. See, e.g., *Weiss v. Weiss*, 52 N.Y.2d 170, 174, 418 N.E.2d 377, 381, 436 N.Y.S.2d 862, 866 (1981). "[H]owever well intentioned, [the mother's] search is for no more than an 'opportunity.'" *Id. In re Marriage of Martinis*, 51 Or. App. 861, 864, 627 P.2d 504, 505 (1981) (mother had not made a formal commitment to marry her fiance, had no personal contact with him in nine months and there was no evidence of the fiance's love for the child); *Abraham v. Abraham*, 44 A.D.2d 676, 353 N.Y.S.2d 796 (health justification "vague"); *Weber v. Weber*, 84 A.D.2d 940, —, 446 N.Y.S.2d 676, 677 (1981). "[M]ere whim or even desire of the custodial parent to seek a new life is not sufficient." *Id. Brown v. Brown*, 261 Iowa 591, —, 155 N.W.2d 426, 427 (1968)(move motivated by

what reasons the mother may submit, the courts are largely inconsistent as to what facts will justify relocation. A sampling of dispositions within different jurisdictions at the trial and appellate levels is provided in the Appendix. These cases illustrate how arbitrary and sex-biased residence restrictions are when applied to specific controversies.

When the court permits a move, it develops alternative visitation provisions for the father.⁹⁵ However, when a court denies the move, it frequently fails to mention the visitation alternatives or summarily dismisses them as inadequate.⁹⁶ This approach underscores the fact that a father can resist a move successfully when the mother's reasons for relocating are deemed insubstantial or devalued, regardless of how insubstantial his reasons are for resisting the move.

The sex-based values that influence the court in the application of residence restrictions are also illustrated by considering how such restrictions operate when a *custodial father* is the burdened party. In *Bennett v. Bennett*,⁹⁷ the custodial father petitioned the court for permission to move with the child to pursue an out-of-state employment opportunity.⁹⁸ The Supreme Court of Wisconsin affirmed the trial court's decision allowing the father to move and denying the mother's cross-petition for a change of custody.⁹⁹ His reason for moving was deemed sufficient; the court decided it was wiser to have the child remain

distaste for local life, "story" of what awaited mother on move to join her mother "uncertain and indefinite").

94. See, e.g., *Courten v. Courten*, 92 A.D.2d 579, 459 N.Y.S.2d 464 (1983) (likely that move was motivated by presence of fiance in California and intention to deprive father of access to child as evidenced by failure to bring child to New York for visit during trial); *In re Denberg*, 34 Misc. 2d 980, 986, 229 N.Y.S.2d 831, 837 (Sup. Ct. 1962) (move occasioned by "pique," not health or welfare of children and desire to punish father for remarrying shortly after divorce by precluding visitation).

95. See *infra* notes 145-53 and accompanying text.

96. See, e.g., *Priebe v. Priebe*, 81 A.D.2d 746, 438 N.Y.S.2d 413 (1981) (no discussion of visitation alternatives); *Scheiner v. Scheiner*, 336 So. 2d 406 (Fla. Dist. Ct. App. 1976), *cert. denied*, 342 So. 2d 1103 (Fla. 1977) (no discussion of visitation alternatives); *Weiss v. Weiss*, 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981) (alternative visitation, whether voluntarily offered or judicially imposed does not necessarily meet the needs of the child or the father); *Giachetti v. Giachetti*, 416 So. 2d 27, 28 (Fla. Dist. Ct. App. 1982) (removal would make continued relationship with child "impossible").

97. 228 Wis. 401, 280 N.W. 363 (1938).

98. *Id.* at —, 280 N.W. at 364.

99. *Id.*

with the father since alternative visitation arrangements were possible.¹⁰⁰ This decision is notable only when compared with the same court's decision in *Fritschler v. Fritschler*,¹⁰¹ a later case involving a custodial mother.

In *Fritschler*, the major issue on appeal was whether the trial court had abused its discretion by denying the custodial mother's move and disregarding the recommendations of three family specialists¹⁰² who supported the mother's move from Wisconsin to Colorado.

Mrs. Fritschler's reasons for moving to Colorado were considered insufficient by the trial court. Reasons cited for her move were to escape from social embarrassment from her husband's reputation as a criminal law attorney, to take advantage of what she considered to be better job opportunities in the area of real estate sales, and better recreational facilities for the children, to help relieve her arthritis and sinus problems, and lastly, to make it on her own in new surroundings without any help or hindrance from her former husband.¹⁰³

The court stated that in *Bennett*, permission to move was premised on the theory "that what was better for the father, who was under a duty to provide support, indirectly benefited the children."¹⁰⁴ The court found "no such benefits" in Mrs. Fritschler's reasons and upheld the decision of the trial court.¹⁰⁵ There was no discussion of why the move was not "better" for her, nor of her duty to support and rear the child that the custody award had imposed. If the decision was founded on the sex-based common law rule that only the father is liable for support, the decision cannot be upheld after *Orr v. Orr*¹⁰⁶ and *Stanton v.*

100. *Id.* Permission to move was conditioned on the father's paying all costs of the mother's move to New York, if she so desired; alternatively, the father would pay all costs of two-months summer visitation in Wisconsin. This is not surprising considering the state of interstate transportation in 1938.

101. 60 Wis. 2d 283, 208 N.W.2d 336 (1973).

102. *Id.* at ___, 208 N.W.2d at 338.

103. *Id.*

104. *Id.* at ___, 208 N.W.2d at 339.

105. *Id.*

106. 440 U.S. 268 (1979).

Stanton.¹⁰⁷

The Supreme Court of Wisconsin also reconciled its interim decision in *Whitman v. Whitman*¹⁰⁸ on the law of the case, which held that removal for a proper purpose and beneficial to the parent may be permitted if not detrimental to the children.¹⁰⁹ The *Fritschler* court emphasized language in *Whitman* which indicated that custody necessarily implied some loss of freedom to relocate.¹¹⁰ However, the facts of *Whitman* are irreconcilable with this reading, since the mother there was allowed to move when her only reason was to be closer to her parents.¹¹¹

Although *Bennett* reconciles neatly with *Whitman* with no explicit sex-bias, *Fritschler* is blatantly sex-based, and much more typical of the narrow view the courts take when a mother seeks to relocate. *Bennett* illustrates the focus of the court's analysis when the custodial parent is the father. In a random review of over one hundred fifty residence restriction cases, only one other case involved a custodial father's removal petition.

In *In re Marriage of Gautier*,¹¹² the custodial father had secured employment in California after unsuccessfully seeking local work in Oregon.¹¹³ The trial court rejected his argument that the mother's interests in visitation could be accomplished if she moved to California. The court conditioned continued custody in the father on his return to Oregon from California.¹¹⁴ The court of appeals reversed, noting that "[t]he effect of the trial court's order is to require him to quit his job and move back to [Oregon] or lose custody of the [child]."¹¹⁵

This decision is remarkable in that it considered the effect of the trial court's orders on the party burdened with custodial responsibilities. It was, however, a predictable deviation in view

107. 421 U.S. 7 (1975).

108. 28 Wis. 2d 50, 135 N.W.2d 835 (1965).

109. *Whitman v. Whitman*, 28 Wis. 2d 50, 135 N.W.2d 835 (1965).

110. *Fritschler*, 60 Wis. 2d at ___, 208 N.W.2d at 339.

111. *Whitman*, 28 Wis. 2d at 50, 135 N.W.2d at 835.

112. 58 Or. App. 510, 648 P.2d 1308, *petition denied*, 293 Or. ___, 653 P.2d 998 (1982).

113. *Gautier*, 58 Or. App. at ___, 648 P.2d at 1309.

114. *Id.*

115. *Id.* at ___, 648 P.2d at 1310.

of the general concern of protecting the father's interests, whether or not he is the custodial parent. *Gautier* demonstrates how residence restrictions would operate differently if the majority of custodial parents were men. It also supports the corollary proposition that such restrictions would probably cease to exist if most custodial parents were men.

The decision in *Gautier* is all the more significant because of the absence of any mention of *In re Marriage of Smith*.¹¹⁶ In *Smith*, the Supreme Court of Oregon deferred to the trial court's decision, which conditioned the *mother's* continued custody on her return to Oregon from California.¹¹⁷ The mother had married a long-time California resident under the mistaken belief that her former husband would not oppose her move to California with the children.¹¹⁸ The appellate dispositions in *Smith* and *Gautier* preferred the father's economic interests to the mother's "personal" interests. There was simply no mention of the effect of the trial court's order on the mother.

In short, the substantial reasons to legitimate a move under current residence restriction analysis depend on gender and fluctuate with the value preferences of the court. The overriding concern in imposing and enforcing residence restrictions stems from a preoccupation with the potential effects of the move on the father's interests, irrespective of the cost to the mother. There is, therefore, good reason to be concerned about the breadth of discretion which courts exercise in residence restriction controversies. Because these restrictions operate to subordinate a mother's post-divorce interests and opportunities to the father's, they should not, absent a compelling justification, be tolerated in today's mobile and supposedly egalitarian society.¹¹⁹

116. 290 Or. 567, 624 P.2d 114 (1981).

117. *Smith*, 290 Or. at ___, 624 P.2d at 115.

118. *Id.*

119. Some commentators question the constitutionality of residence restrictions on the custodial parent's right to travel. See Note, *Residence Restrictions on Custodial Parents: Implications for the Right to Travel*, 12 RUTGERS L.J. 341 (1981); Bodenheimer, *Equal Rights, Visitation and the Right to Move*, FAM. ADVOC. 18 (1978); Note, *Restrictions on a Parent's Right to Travel in Child Custody Cases: Possible Constitutional Questions*, 6 U.C.D. L. REV. 181 (1973) [hereinafter cited as Note, *Right to Travel*]. See also Comment, *Deprivation of Rights*, *supra* note 56 (discussing also the right to free association and privacy).

C. RESIDENCE RESTRICTIONS ARE SEX-BASED IN JUSTIFICATION AND EFFECT

Residence restrictions are usually justified as necessary to protect the child from harm or, more directly, to preserve visitation.¹²⁰ Close analysis, however, reveals that residence restraints are not logically tailored to meet the visitation concern and that concern can be met by alternative visitation provisions. Nor does protection of the child require residence restrictions, since that interest is adequately protected by the mother in her role as custodial parent and by the existing rules governing changes of custody. Because the burdens are carried predominately, if not exclusively, by women, the continued existence of residence restrictions is unexplainable on grounds other than sex.

1. *Protecting the Child*

The *parens patriae* doctrine has long been recognized to be part of the equity jurisdiction of the courts.¹²¹ Under this doctrine, the state is justified in intervening in family decisionmaking to protect the best interests of the child in matters affecting the child's health, education and development.¹²² In the context

120. Traditionally, residence restrictions were imposed and defended to enforce the provisions of the home state's custody decree or to discourage forum shopping in post divorce matters. Note, *Right to Travel*, *supra* note 119, at 351-57. This justification is undercut today by the federal enactment of the Parental Kidnapping Prevention Act of 1980 and the adoption of the Uniform Child Custody Jurisdiction Act in 44 states. *Id.* at 353-57. Implicitly, courts recognize the lack of any continued vitality in this rationale for it is barely mentioned, and given short shrift when noted at all. Compare *Auge v. Auge*, 334 N.W.2d 393, 399 (Minn. 1983) (related concerns addressed by the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act of 1980) with *Girvin v. Girvin*, 471 S.W.2d 683, 685 (Mo. Ct. App. 1971) (although a joint custody relocation controversy, the rationale is equally applicable to traditional custody cases: enforcement difficulties are not insuperable where nonresidence is in the best interests of the child). In addition, as early as 1938, the court in *Bennett v. Bennett*, 228 Wis. ___, 280 N.W. 364 (1938), recognized the inherent weakness of justifying residence restrictions on the ground that they were necessary to protect the home state's custody decree, where the parents, principles of comity, and the full faith and credit clause of the United States Constitution could be relied upon to furnish assistance in the recognition of the home state's orders in other states. *Id.* Because the home state decree protection rationale was not relied upon as a basis of decision in any of the cases reviewed, and in the light of the aforementioned weaknesses in the rationale, it is not further discussed in this Article.

121. See H. CLARK, *supra* note 55, at 572.

122. See generally Note, *State Intrusion into Family Affairs: Justifications and*

of imposing or enforcing residence restrictions, the court is compelled to act in defense of the child's best interests because these interests are viewed as inadequately represented by counsel for the disputing parties.¹²³ This premise contradicts the implication that the court has already found that the mother is capable of adequately protecting the child's best interests when it made the custody award.¹²⁴

The child involved in the relocation controversy has a multitude of physical and emotional interests at stake. These include the subjective and objective quality of the home,¹²⁵ school,¹²⁶ recreational facilities,¹²⁷ childcare availability,¹²⁸ friends,¹²⁹ church,¹³⁰ and overall community environment of the old home as compared to the proposed new residence. Due to the subjective component implicit in any comparison, what is "best" for the child's physical interests is largely indeterminate and must be based upon the decision-maker's values.

Few would dispute that the child has emotional interests in the continuity and stability of his or her relationship with both the father and mother.¹³¹ The child also has an interest in having a happy, well-adjusted custodial parent since "the fact remains that ordinarily the day-to-day routine of the [child] . . . and the quality of [his or her] environment and general style of life is that which is provided by the [mother] and which are, indeed, [her] obligation to provide."¹³² In the relocation context, these two psychological interests appear to be at odds.

Limitations, 26 STAN. L. REV. 1383, 1390-92 (1974).

123. *Id.*

124. See *supra* notes 65-71 and accompanying text.

125. See, e.g., *Knoblauch v. Jones*, 613 S.W. 2d 161 (Mo. Ct. App. 1981); *Helentjaris v. Sudano*, 194 N.J. Super. 220, 476 A.2d 828 (App. Div. 1984).

126. See, e.g., *Gray v. Gray*, 57 Ill. App. 3d 1, 372 N.E.2d 909 (1978); *Middlekauff v. Middlekauff*, 161 N.J. Super. 84, 390 A.2d 1202 (App. Div. 1978).

127. See, e.g., *Fritschler v. Fritschler*, 60 Wis. 2d 283, 208 N.W.2d 336 (1973); *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27 (Ch. Div. 1976).

128. See, e.g., *Arquilla v. Arquilla*, 85 Ill. App. 3d 1090, 407 N.E.2d 948 (1980); *In re Marriage of Young*, 529 P.2d 344 (Colo. Ct. App. 1974).

129. See *In re Marriage of Feliciano*, 103 Ill. App. 3d 666, 431 N.E.2d 1120 (1981).

130. See, e.g., *In re Marriage of Lower*, 269 N.W.2d 822 (Iowa 1978); *Gottschall v. Gottschall*, 210 Neb. 679, 316 N.W.2d 610 (1982).

131. See generally *Mnookin*, *supra* note 43, at 265; J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *supra* note 56, at 31-35.

132. *D'Onofrio v. D'Onofrio*, 144 N.J. Super. at ___, 365 A.2d at 29.

If the relocation is permitted, the continuity of the relationship with the father may be impaired.¹³³ However, if the move results in a change of custody to the father, the continuity of the relationship with the mother will definitely be impaired.¹³⁴ To the extent that the related trauma can be viewed qualitatively, the continuity interest would favor continued custody in the mother, who has had the daily care of the child. Similarly, if the move is denied and the mother foregoes the move in order to avoid a loss of custody, the child's interest in having a happy mother may be impaired. Both the continuity interest and the "happy parent" interest thus appear to militate against any residence restraints.

Ultimately both the child's physical and psychological interests are indeterminate due to a lack of value consensus over whether geographic continuity and stability is more important than continuity with the custodial parent, and the inability to predict the consequences on the child of allowing or denying relocation.¹³⁵ If the child's interests point in any direction, they appear to favor the mother's freedom to move. This comports with the policies and principles underlying the general rules on change of custody and the need to give the mother the freedom to fulfill the responsibilities imposed by the award of custody.¹³⁶ To the extent that the child's interests are indeterminate, the court lacks the competence to make a value and sex-neutral decision in the child's best interests. Therefore, a policy of deference to the mother's decisionmaking ability is more rationally related to the state's interest in protecting the child.

2. *Preserving Visitation Rights*

Residence restrictions are frequently justified as necessary to preserve the mutual visitation rights of the father and

133. See *infra* notes 145-53 and accompanying text.

134. See *supra* note 77 and accompanying text.

135. See Mnookin, *supra* note 43, at 255-68, where the author makes a very convincing argument as to the innate indeterminacy of the best interests standard. See generally J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 56, at 51-52, where the authors argue that the law will not act in the child's best interests, but add to the uncertainties when it tries to predict the future.

136. See *supra* notes 66-79 and accompanying text.

child.¹³⁷ However, this justification expressly subordinates the mother's interests and is fraught with contradictions that undercut any surface logic.

If residence restrictions were truly designed to further the *child's* interest in developing a strong relationship with the father, residence restrictions would look and operate differently. For example, the child, or the mother on behalf of the child, or the court would be able to compel the father's visitation and to impose local residence restrictions on him to ensure convenient visitation—an awkward and improbable system. In fact, under the current approach, even a father who has relocated and does not fully exercise visitation rights may still bar a move by the mother with the child.¹³⁸

In *D'Onofrio v. D'Onofrio*,¹³⁹ the court observed:

[A] noncustodial parent is perfectly free to remove himself from [the] jurisdiction despite the continued residency here of his children in order to seek opportunities for a *better or different* lifestyle for himself. And if he does choose to do so, the custodial parent could hardly hope to restrain him from leaving [the] State on the ground that his removal will either deprive the children of the paternal relationship or depreciate its qual-

137. See H. CLARK, *supra* note 55, at 590. There is disagreement among the courts whether visitation is a right of the parent, the child or a joint right of the parent and the child. See, e.g., *In re Denberg*, 34 Misc. 2d 980, 985, 229 N.Y.S.2d 831, 837 (Sup. Ct. 1962) (natural right of father); *Weiss v. Weiss*, 52 N.Y.2d 170, 176, 418 N.E.2d 377, —, 436 N.Y.S.2d 862, 865 (1981) (visitation is a joint right of the noncustodial parent and of the child); *Bernick v. Bernick*, 31 Colo. App. 485, 487, 505 P.2d 14, 15 (1972) (“ . . . primarily a right of the [child] and secondarily a right of the noncustodial parent”); *In re Marriage of Lower*, 269 N.W.2d 822, 827 (Iowa 1978) (derivative from and subservient to the best interests of the child). Cf. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 56, at 121. Visitation rights imposed by court order merely shift the power to deprive the child of his “basic right” to see his father from the mother to the father. Therefore, the authors argue that visitation privileges are themselves a source of discontinuity and the father should have no legally enforceable right to visit the child. The authors argue, further, that the mother, not the court, must decide how to parent the child as the court lacks competence to be a “super-parent.” Court intervention undermines the mother's authority and capacity to parent. *Id.* The latter position has been extremely controversial. See generally Crouch, *An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child*, 13 FAM. L.Q. 49 (1979).

138. See *supra* note 38.

139. 144 N.J. Super. 200, 365 A.2d 27 (Ch. Div.), *aff'd*, 144 N.J. 352, 365 A.2d 716 (App. Div. 1976).

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ity. The custodial parent, who bears the essential burden and responsibility for the children is clearly entitled to the same option to seek a *better* life for herself and the children.¹⁴⁰

This observation disposes of any contention that the visitation rationale is designed to further the interests of the child's relationship with the father. It also highlights the court's hierarchy of values insofar as the father is free to seek a better *or* different lifestyle, while the mother may only seek a "better" life for the family unit.¹⁴¹

Because residence restrictions are not designed to protect the child's interests in visitation, their objective must be to protect the father's interests in visitation. The visitation "right" that is purportedly protected under this rationale is generally awarded to the father upon divorce under the theory that a parent has a right to see his child, except where it is inimical to the welfare of the child.¹⁴² This right consists of the limited right to visit with the child at specified times. It does not include the right to make decisions affecting the child's needs or welfare beyond the specified visitation period, because such rights and responsibilities belong to the mother under the custody award.¹⁴³ Residence restrictions place an irrational and arbitrary burden on the mother's freedom in light of the nature of the limited visitation right, the fact that local restrictions are rarely enforced,¹⁴⁴ and the fact that adequate alternative visitation can be arranged.

When a mother moves without legal opposition from the father, presumably the parents have negotiated satisfactory alternative arrangements for visitation without the need for judicial input. Depending on the parties' circumstances and the size of the state in which they reside, quantitative and qualitative hardships in a permissible intrastate move are indistinguishable from a potentially prohibited interstate relocation. In addition, the court may devise an alternative visitation schedule if it deems the mother's reasons for moving substantial.

140. *D'Onofrio*, 144 N.J. Super. at ___, 365 A.2d at 30 (emphasis added).

141. *See supra* notes 60-64 and accompanying text.

142. *See supra* note 137 and accompanying text.

143. *See supra* notes 66-67 and accompanying text.

144. *See supra* note 20.

Alternative visitation may consist of longer, but less frequent, visitation intervals: for instance, six-weeks summer visitation and alternate Christmas holidays at the father's home;¹⁴⁵ two-weeks summer vacation, one week at Christmas and one week in the spring at the father's home with liberal visitation when the father is in the child's neighborhood.¹⁴⁶ At least one court has speculated that such an alternative schedule, giving the father constant and exclusive parental contact with the child, may better serve the paternal relationship than the typical visitation of shorter, more frequent visits.¹⁴⁷

In *Helentjaris v. Sudano*,¹⁴⁸ the mother who had moved to Ohio from northern New Jersey to be closer to relatives who could assist her with her infant daughter and to obtain more flexible working hours, appealed certain provisions of the divorce decree.¹⁴⁹ The court reversed those provisions which conditioned her right to continued custody on her return to within a forty mile radius of the father's home in New Jersey. The court noted that the father could relocate—an obvious, but rarely mentioned, alternative.

[T]he father could himself relocate to Ohio. It is obviously no more difficult for him to do so than for the mother to return to New Jersey. The court's assumption of the ability to pursue a professional career in another state applies equally to both litigants. [The mother] is, moreover, no less alien to New Jersey than the father would be to Ohio, and there is no greater reason for her to give up the comfort of her family and a satisfactory professional situation than it would be for him to do so. If either is to sacrifice in this respect, there is indeed less reason to demand the sacrifice to be made by the [mother] since it is she, in the end, who must arrange her life in a manner consistent with the day-to-day burdens of simultaneously raising a child and pursuing a career.¹⁵⁰

145. *Burich v. Burich*, 314 N.W.2d 83-84 (N.D. 1981).

146. *D'Onofrio*, 144 N.J. Super. at —, 365 A.2d at 32-33.

147. *Id.* at —, 365 A.2d at 30.

148. 194 N.J. Super. 220, 476 A.2d 828 (App. Div. 1984).

149. *Helentjaris*, 194 Super. at 220, 476 A.2d at 828.

150. *Id.* at —, 476 A.2d at 832.

The court's approach mirrored an earlier decision by the same court in *Middlekauff v. Middlekauff*.¹⁵¹ That decision reversed the trial court's denial of permission to the mother to move from Newark to Manhattan to pursue graduate studies.¹⁵² The court recognized that the father was capable of maintaining visitation without judicial intervention, and observed that the additional visitation burden on the father was a forty-five minute drive each weekend, but that "he could hardly complain of having to drive to Manhattan on weekends while expecting her to do so several times each week."¹⁵³

As suggested by the foregoing opinions, when the mother is permitted to move, the parties can find alternative methods of accommodating visitation. Thence, residence restrictions are not necessary to protect the father's visitation interest. The visitation rationale is also stripped of its logic in light of the fact that courts only explore visitation alternatives after they have decided that the mother's reasons for moving are substantial.¹⁵⁴ Logically, if the primary purpose for enforcing residence restrictions were to protect the father's visitation rights, it would start and end with a formulation of substitute visitation arrangements.

IV. PROPOSALS FOR CHANGE

Reforms are required in the statutory and decisional law in order to curb sex discrimination, to preserve parental and personal autonomy, and to protect the children of divorced parents. The starting point should be that the law impose no residence restrictions on the post-divorce family unit. The parties should, however, remain free to negotiate reciprocal residence restrictions, provided certain procedural safeguards are followed. The court's function would thus be properly limited to modifying existing visitation schedules and enforcing privately negotiated agreements. To implement this proposal, state legislatures should repeal statutes requiring court permission or consent of the noncustodial parent to relocate¹⁵⁵ and the following policies

151. 161 N.J. Super. 84, 390 A.2d 1202 (App. Div. 1978).

152. *Middlekauff*, 161 N.J. Super. 84, —, 390 A.2d 1202, 1206 (App. Div. 1978).

153. *Id.* at —, 390 A.2d at 1209.

154. See *supra* note 96 and accompanying text.

155. See *supra* note 11.

should be adopted.¹⁵⁶

First, statutes governing traditional custody awards should be amended to specifically preclude application in a relocation controversy to ensure that courts do not embark on a renewed “best interests” inquiry that is appropriate only to the initial custody award.¹⁵⁷ Such an amendment should serve to emphasize that the court has already chosen the custodial parent best qualified to protect the welfare of the child. It would underscore the fact that a proposed move does not, by itself, justify relitigation of this matter. It should make clear that the court’s duty in a relocation controversy is limited to determining alternative visitation arrangements when the parties are unable to agree on these matters without court intervention, without regard to the custodial parent’s reasons for moving.

Second, statutes governing change of custody litigation should be amended to state specifically that relocation, without more, is not a “substantial change of circumstances” meriting a change of custody. This amendment is aimed at correcting current analysis in many jurisdictions that erroneously places the burden of proof on the custodial parent seeking relocation over a change of custody petition.¹⁵⁸ It underscores the fact that the heavy burdens of proof imposed in general change of custody litigation are designed to protect the status quo of existing custody arrangements and not existing visitation arrangements. The burden of proof should remain on the parent requesting a change of custody. Further, it should explicitly bar a change of custody based on necessary changes in visitation unless the non-custodial parent bears the burden of showing specific harm to the child resulting from the move.¹⁵⁹

Third, a court should, upon motion by either party, modify existing visitation schedules to accommodate the parties’ changes in proximity. The court may require the parties to share increased costs of visitation proportionate to their ability to do

156. Some of the proposals in this Article agree with suggestions made by a student commentator in Note, *Judicial Role*, *supra* note 34, at 967-73. However, they differ significantly in perspective and in the degree of restraint proposed.

157. See *supra* notes 65-69 and accompanying text.

158. See *supra* notes 72-90 and accompanying text.

159. See *Auge v. Auge*, 334 N.W.2d 393 399 (Minn. 1983). See also *supra* note 47.

so. The court should not, however, reduce child support or other economic obligations of the noncustodial parent to the custodial parent. Although a move may necessitate a change in visitation arrangements, it does not follow that the move reduces the child's needs for economic support, or the noncustodial parent's duty to provide an aliquot share.¹⁶⁰ To reduce financial obligations would penalize the custodial parent for exercising the freedom to relocate. This policy should serve to eliminate the risk of a noncustodial parent seeking alternative visitation privileges merely to gain an economic advantage.¹⁶¹

Fourth, a court should not allow the parties to impose residence restrictions by agreement unless such restrictions are based upon a reciprocal agreement where *both* parties reasonably limit their freedom to move. To be enforceable, the agreement must provide for arbitration of disputes with a pre-determined, mutually approved, arbitrator under general principles of arbitration. Further, the agreement must be separately signed by both parties in the presence of independent counsel and with full disclosure with respect to the dangers of such mutually obligatory restraints.

Moreover, judicial responsibility to protect the child is not abrogated by honoring such mutual agreements because the court is merely respecting the custodial parent's duty and ability to make decisions in the child's best interests. The custodial parent's decision to assume a residence restraint on equal footing with the noncustodial parent is a reflection of both parents' concepts of what best protects the child's interests. In any event, the court is free to disallow "unreasonable" agreements at the inception. As a practical matter, the explicit safeguards imposed make it unlikely that many parents would enter into such a burdensome agreement unless they were on exceptionally good terms after the divorce. Finally, the arbitration requirement is necessary to ensure that the court's involvement in such post-divorce matters is limited to respecting the wishes of the parties.

Although these proposals may appear radical, they comport with traditional principles of custody and family autonomy

160. See *supra* note 67 and accompanying text.

161. See *supra* notes 63-64 and accompanying text.

while eliminating the potential for harmful sex-based application. They merely ratify and approve a sex-neutral basis for allowing relocation while protecting visitation and minimizing socially and individually expensive litigation.

The proposals place no greater burden on the disappointed father who may lose under current principles of residence restrictions after costly litigation. They ensure that a mother, under threat of litigation, does not bargain away child support or other financial obligations in exchange for the "right" to move away and still retain custody. The proposals provide the private resolution of relocation issues. In addition, they further notions of judicial economy insofar as the level and nature of inquiry is limited to the issue of rearranging visitation or enforcing an arbitrator's award. Finally, they serve to decrease the burdens borne by a mother who wishes "to keep her children whose care she has so disproportionately assumed, especially where society continues to discriminate against her in all other areas."¹⁶²

At least one court has recognized that these changes are necessary and appropriate:

Were we writing on a clean slate, we could logically hold that the court is authorized . . . to award custody to a parent; that custody includes the authority to make parental decisions such as choice of residence; that there is no authority for the court to substitute its parental judgment in the form of conditions imposed upon custody; and that the court, after making an award, should get out of the litigants' lives unless continuation of the status quo would be injurious to the child and custody must be modified to avoid the injury¹⁶³

V. CONCLUSION

Residence restrictions are frequently imposed on custodial

162. Uviller, *supra* note 56, at 109.

163. *Meier v. Meier*, 36 Or. App. 685, 688, 585 P.2d 713, 715 (1978), *rev'd*, 286 Or. 437, 595 P.2d 474 (1979). This Article did not discuss this case in text because it involved a proposed move to Canada and restrictions with respect to foreign countries involve considerations not within the scope of this discussion.

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parents, but not on noncustodial parents. They have a disparate impact on women because the custodial parent is usually the mother.

Residence restrictions analysis implicates a lack of sex-neutrality because it is contrary to traditional concepts of custody, rules of change of custody, and cannot therefore be justified any other way. The father's interests are balanced against the mother's under the guise of the "best interests of the child" standard. However, the balance is tipped in favor of the father because the mother's real interests are devalued or simply not added into the balance. The courts have focused on the custodial parent's real interests only when they are confronted with a custodial father.

The state's interest in protecting the child by placing the burden of residence restrictions on the custodial parent is frustrated because there is no consensus that a move will impair the child's interests. The court has already determined by the original custody award that the custodial parent is best able to protect the child's interests. There is no demonstrable, sex-neutral reason why a move should require relitigation of that issue.

The state cannot justify residence restrictions on the custodial parent by asserting the noncustodial parent's visitation interest. This rationale is explicitly sex-based because it favors the father's post-divorce interests. It is also unnecessary because the noncustodial parent's limited visitation interest can usually be adequately accommodated by alternative visitation arrangements.

The state's intervention is not logically related to protecting the child or the visitation interest of a noncustodial parent; residence restrictions admit a sex-based justification with respect to a preference for freedom of movement for fathers and not for mothers. An analysis of the reported cases demonstrates that residence restrictions are sex-discriminatory in application. They should therefore be abandoned. The sex-neutral policies proposed above conform with traditional custody principles while eliminating state-imposed residence restrictions which cannot be justified on any level other than a sexually discriminatory one. Justice and equality demand no less.

APPENDIX
RESIDENCE RESTRICTION LITIGATION:
A SAMPLING OF OUTCOMES

CASE	REASONS ALLEGED	DISPOSITION	
		AT TRIAL	ON APPEAL
Tanttila v. Tanttila, 152 Colo. 446, 382 P.2d 798 (1963).	To live "more cheaply," be closer to relatives, more flexible work schedule	Granted	Reversed
Nelson v. Card, 162 Colo. 274, 425 P.2d 276 (1967).	Remarriage and new husband got better job	Granted	Affirmed
Bernick v. Bernick, 31 Colo. App. 485, 505 P.2d 14 (1972).	Job opportunity	Denied	Reversed
<i>In re</i> Marriage of Young, 529 P.2d 344 (Colo. Ct. App. 1974).	Relatives, job opportunities, post-divorce tensions	Granted	Affirmed
Brandon v. Faulk, 326 So. 2d 76 (Fla. Dist. Ct. App.), <i>cert. denied</i> , 336 So. 2d 104 (Fla. 1976).	Remarried, new husband's business	Denied	Affirmed
Giachetti v. Giachetti, 416 So. 2d 27 (Fla. Dist. Ct. App. 1982).	Remarried, better job for new husband, relatives of both	Denied	Affirmed
Garland v. Garland, 19 Ill. App. 3d 951, 312 N.E.2d 811 (1974).	Proposed remarriage and new job for both	Granted	Affirmed

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CASE	REASONS ALLEGED	DISPOSITION	
		AT TRIAL	ON APPEAL
<i>Tandy v. Tandy</i> , 42 Ill. App. 3d 87, 355 N.E.2d 585 (1976).	Relatives, job, health of mother and child	Granted	Affirmed
<i>Gray v. Gray</i> , 57 Ill. App. 3d 1, 372 N.E.2d 909 (1978).	New job, detailed arrangements for child	Granted	Affirmed
<i>Arquilla v. Arquilla</i> , 85 Ill. App. 3d 1090, 407 N.E.2d 948 (1980).	Better job, better cost of living, advance arrangements for child	Denied	Reversed
<i>In re Marriage of Burgham</i> , 86 Ill. App. 3d 341, 408 N.E.2d 37 (1980).	New house, new job, close to boyfriend though no financial gain	Denied	Reversed & remanded
<i>Brown v. Brown</i> , 261 Iowa 591, 155 N.W.2d 426 (1968).	Better able to do things for child, local situation depressing, no opportunity for advancement	Granted	Reversed
<i>In re Marriage of Gutermuth</i> , 246 N.W.2d 272 (Iowa 1976).	New job, desire to insulate child from post-divorce tensions	Denied	Reversed
<i>In re Marriage of Lower</i> , 269 N.W.2d 822 (Iowa 1978).	Promotion with substantial increase, more time with child, extensive advance arrangements for child	Denied	Reversed

CASE	REASONS ALLEGED	DISPOSITION		1986]
		AT TRIAL	ON APPEAL	
Jafari v. Jafari, 204 Neb. 622, 284 N.W.2d 554 (1979).	New job, small increase in salary, better advancement opportunities and advance arrangements for child	Granted	Affirmed	RESIDENCE RESTRICTIONS
Gottschall v. Gottschall, 210 Neb. 679, 316 N.W.2d 610 (1982).	Fiance's new job will permit mother to remain at home with child; he relates to child well and advance arrangements made for child	Granted	Affirmed	
D'Onofrio v. D'Onofrio, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976).	New job, relatives, better housing	Granted	Affirmed	
Middlekauff v. Middlekauff, 161 N.J. Super. 84, 390 A.2d 1202 (App. Div. 1978).	Graduate education to get better job and detailed arrangements for child	Denied	Reversed	
Helentjaris v. Sudano, 194 N.J. Super. 220, 476 A.2d 828 (App. Div. 1984).	New job with flexible work hours, relatives	Denied	Reversed	
<i>In re</i> Denberg, 34 Misc. 2d 980, 229 N.Y.S.2d 831 (Sup. Ct. 1962).	Ex-husband's remarriage soon after divorce	Denied	n/a	
Weiss v. Weiss, 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981).	Search for new job, escape social limitations of community of married persons and impact of inflation on tight budget	Granted	Reversed	

CASE	REASONS ALLEGED	DISPOSITION	
		AT TRIAL	ON APPEAL
Martinez v. Konczewski, 56 N.Y.2d 809, 441 N.E.2d 1117, 455 N.Y.S.2d 599 (1982).	Remarriage and husband's new job	Granted	Affirmed
Weber v. Weber, 84 A.D.2d 940, 446 N.Y.S.2d 676 (1981).	Made decision to move, remarried out-of-state resident after hearing, but prior to order	Denied	Reversed
Priebe v. Priebe, 55 N.Y.2d 997, 434 N.E.2d 708, 449 N.Y.S.2d 472 (1982).	Limited support by ex-husband, new job and home obtained, limited local opportunities	Granted	Reversed
Courten v. Courten, 92 A.D.2d 579, 459 N.Y.S.2d 464 (1983).	Join fiance, new job, limited local opportunities	Denied	Affirmed
Klein v. Klein, 93 A.D.2d 807, 460 N.Y.S.2d 607 (1983).	\$1,200 support offered by ex-husband insufficient to allow continued residence in appropriate neighborhood, relatives would help financially and emotionally	Granted	Affirmed
Burich v. Burich, 314 N.W.2d 82 (N.D. 1981).	New husband's job will provide income to support mother and child	Granted	Affirmed