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### Family Law—Relocation Disputes—From Parent to Paycheck: The Demotion of the Noncustodial Parent with the Creation of the Custodial Parent's Presumptive Right to Relocate. *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003).

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FAMILY LAW—RELOCATION DISPUTES—FROM PARENT TO PAYCHECK:  
THE DEMOTION OF THE NONCUSTODIAL PARENT WITH THE CREATION OF  
THE CUSTODIAL PARENT’S PRESUMPTIVE RIGHT TO RELOCATE.  
*Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003).

## I. INTRODUCTION

As the mobility of American society has increased, courts across the United States have been faced with a growing amount of relocation litigation.<sup>1</sup> Because of the competing interests of fathers, mothers, and children, state courts have struggled to develop an appropriate legal standard applicable to relocation disputes.<sup>2</sup> The courts have generally adopted one of four approaches.<sup>3</sup> First, some states follow the “real advantage” approach, an approach requiring the custodial parent first to demonstrate a real advantage to herself and her children before the court will consider a variety of factors.<sup>4</sup> Second, some states recognize a presumptive right in the custodial parent to relocate.<sup>5</sup> Third, some states place on the custodial parent a burden to prove that the move is in the child’s best interests.<sup>6</sup> Finally, some states simply apply a “best interests of the child” standard.<sup>7</sup> Additionally, in response to the relocation quagmire, the American Academy of Matrimonial Lawyers proposed the Model Relocation Act in 1997.<sup>8</sup> The Model Relocation Act is a template of a relocation statute proposed to aid state legislative bodies in drafting a statutory solution to the relocation problem.<sup>9</sup>

According to most family law practitioners, relocation litigation is one of the most important topics in family law today.<sup>10</sup> Its importance derives from the high financial and emotional costs that it imposes on the litigating

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1. Edwin J. Terry et al., *Relocation: Moving Forward or Moving Backward*, 31 TEX. TECH L. REV. 983, 984 (2000). “Relocation litigation” refers to the scenario that arises when the custodial parent desires to move himself/herself and the children away from the noncustodial parent and the noncustodial parent objects. *Id.*

2. Steven Leben & Megan Moriarty, *A Kansas Approach to Custodial Parent Move-Away Cases*, 37 WASHBURN L.J. 497, 498 (1998).

3. *Id.*

4. *Id.* at 498–504.

5. *Id.* at 504–07.

6. *Id.* at 507–09.

7. *Id.* at 509–12.

8. See American Academy of Matrimonial Lawyers, *Proposed Model Relocation Act*, 15 J. AM. ACAD. MATRIMONIAL LAW 1 (1998). The Board of Governors of the American Academy of Matrimonial Lawyers (AAML) adopted the Proposed Model Relocation Act in Cancun, Mexico, on March 9, 1997. *Id.*

9. *Id.* at 2.

10. Terry, *supra* note 1, at 985.

parties.<sup>11</sup> Furthermore, relocation litigation impacts society because of the effect it has on the children involved.<sup>12</sup>

This note explores the approach of the Arkansas courts to relocation litigation through the examination of the 2003 Arkansas Supreme Court opinion *Hollandsworth v. Knyzewski*,<sup>13</sup> a decision that attempted to clarify the standards that govern relocation disputes in Arkansas courts.<sup>14</sup> The note begins this examination with a historical-legal background of the topic, moving from the first mention of the issue by the Arkansas Supreme Court in 1916, through the Arkansas Court of Appeals's adoption of a new standard in 1994, and finally to the treatment of that standard in recent years by the Arkansas Supreme Court.<sup>15</sup> From this historical context, the note explores the Arkansas Supreme Court's reasoning in the 2003 *Hollandsworth* case.<sup>16</sup> Finally, the note discusses the significance and potential ramifications of that opinion.<sup>17</sup>

## II. FACTS

Sheree Hollandsworth and Keith Knyzewski entered into marriage on September 2, 1995, and divorced on October 10, 2000.<sup>18</sup> Their marriage yielded two children, Ethan, born February 1, 1996, and Katherine, born February 17, 1998.<sup>19</sup> The divorce decree granted Sheree primary custody of the children.<sup>20</sup> Subsequent to the divorce decree, the parents informally agreed that each would have the children one-half of the time.<sup>21</sup> Both parties lived in northwest Arkansas<sup>22</sup> as did both sets of their parents and extended family.<sup>23</sup> Pursuant to their agreement, Sheree and Keith divided the time with the children evenly.<sup>24</sup> They shared a mutual respect for the other's par-

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11. See Judith S. Wallerstein & Tony T. Tanke, *To Move or Not To Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 306 (1996).

12. *Id.* at 307-12.

13. 353 Ark. 470, 109 S.W.3d 653 (2003) ("*Hollandsworth II*").

14. *Id.*, 109 S.W.3d at 653.

15. See *infra* Part III.

16. See *infra* Part IV.

17. See *infra* Part V.

18. *Hollandsworth v. Knyzewski*, 78 Ark. App. 190, 193, 79 S.W.3d 856, 858 (2002) ("*Hollandsworth I*").

19. *Id.*, 79 S.W.3d at 858.

20. *Id.*, 79 S.W.3d at 858.

21. *Id.*, 79 S.W.3d at 858.

22. *Id.*, 79 S.W.3d at 858.

23. Appellee's Testimony on Cross Examination, Abstract of Testimony at 14, *Hollandsworth v. Knyzewski*, 78 Ark. App. 190, 79 S.W.3d 856 (2002) (No. 02-720).

24. Appellant's Testimony on Direct Examination, Abstract of Testimony at 3, *Hollandsworth v. Knyzewski*, 78 Ark. App. 190, 79 S.W.3d 856 (2002) (No. 02-720). Sheree

enting skills, agreeing at trial that they both had good parenting skills and the abilities to meet the children's needs.<sup>25</sup>

Sheree remarried on December 31, 2000.<sup>26</sup> To be with her new husband,<sup>27</sup> Sheree desired to move herself and her children to Clarksville, Tennessee, a distance of five hundred miles from Keith's residence.<sup>28</sup> In early January of 2001, Sheree informed Keith that she was relocating to Clarksville and intended to take their children with her.<sup>29</sup> On January 11, 2001, Keith filed a petition requesting that the court prohibit Sheree's relocation with the children to Tennessee and further requesting that the court award him primary custody of the children, arguing that Sheree's relocation would constitute a material change in circumstances warranting custody modification.<sup>30</sup>

The trial court ruled in favor of Keith, denying Sheree's petition to relocate and granting Keith's petition to modify custody.<sup>31</sup> The trial court analogized the facts of this case to those presented in *Hickmon v. Hickmon*<sup>32</sup> and found that Sheree, as custodial parent, had the burden under a *Staab*<sup>33</sup> analysis to show a "real advantage" to her and to the children for the proposed move from northwest Arkansas to Tennessee.<sup>34</sup> The trial court concluded that Sheree had failed to meet that burden.<sup>35</sup> The court then examined the facts of the case under the factors of the *Staab* analysis,<sup>36</sup> a framework of factors used to make relocation determinations.<sup>37</sup> The court found that neither party had improper motives and that Sheree would comply with visitation orders if the court granted her relocation request.<sup>38</sup> The trial court

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had the children on Monday afternoons, Tuesdays, Wednesdays, and Thursdays, and Keith had them on Monday evenings, Fridays, Saturdays, and Sundays. *Id.*

25. *Hollandsworth I*, 78 Ark. App. at 194, 79 S.W.3d at 859.

26. *Hollandsworth II*, 353 Ark. 470, 473, 109 S.W.3d 653, 655 (2003).

27. *Id.*, 109 S.W.3d at 655. Sheree's new husband, Brian Hollandsworth, was a corporal in the United States Army stationed in Fort Campbell, Kentucky, and was living in Clarksville, Tennessee. *Id.*

28. *Id.* at 486, 109 S.W.3d at 664.

29. *Id.* at 473, 109 S.W.3d at 655.

30. *Id.*, 109 S.W.3d at 655.

31. *Hollandsworth I*, 78 Ark. App. 190, 194, 79 S.W.3d 856, 859 (2002).

32. 70 Ark. App. 438, 444, 19 S.W.3d 624, 630 (2000). The *Hickmon* court did not find the situation of a new husband/stepfather who provided stability and income for the child sufficient to warrant relocation. *Id.* at 445, 19 S.W.3d at 629. That court denied the move of the children to Arizona, concluding that there was no way to substitute the long distance visitation for the relationship the children had with their father in Arkansas. *Id.*, 19 S.W.3d at 627.

33. *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994).

34. *Hollandsworth II*, 353 Ark. at 474, 109 S.W.3d at 656.

35. *Id.*, 109 S.W.3d at 656.

36. *Id.*, 109 S.W.3d at 656.

37. See *infra* Part III.D.

38. *Hollandsworth II*, 353 Ark. at 474, 109 S.W.3d at 656.

went on to hold, however, that the proposed relocation was not in the best interests of the children because it would disrupt the relationship between the children and their father, Keith.<sup>39</sup> The court also found that the move would disrupt the strong family ties the children had established with their extended family in northwest Arkansas.<sup>40</sup> For these reasons, the trial court ruled in favor of Keith.<sup>41</sup>

Sheree appealed, and Divisions III and IV of the Arkansas Court of Appeals reversed the trial court's rulings in a decision that included five concurrences and five dissents.<sup>42</sup> The appellate court held that the trial court erred in its finding that Sheree had not proved a "real advantage" to the new family unit.<sup>43</sup> Sheree argued, and the appellate court agreed, that the advantages of a two-parent home and the financial advantages of her new husband's career amounted to the requisite advantage the court required Sheree to prove.<sup>44</sup> The appellate court then noted that the trial court was correct in finding some advantages to the move under the factors of the *Staab* analysis.<sup>45</sup> The appellate court further stated that those advantages alone might be significant enough to support the relocation.<sup>46</sup> The Arkansas Court of Appeals then reversed the trial court's ruling, concluding that the trial court clearly erred in denying Sheree's petition to relocate and in granting Keith's petition to change custody.<sup>47</sup> Keith Knyzewski appealed, and the Arkansas Supreme Court granted his petition.<sup>48</sup>

### III. BACKGROUND

The examination of relocation law in Arkansas begins with the Arkansas Supreme Court's first mention of the issue in 1916.<sup>49</sup> This section then provides an overview of the two standards that governed Arkansas relocation disputes during the early to middle part of the twentieth century.<sup>50</sup> The section then moves to an examination of the legal standard adopted by the

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39. *Id.*, 109 S.W.3d at 656.

40. *Id.*, 109 S.W.3d at 656.

41. *Hollandsworth I*, 78 Ark. App. 190, 194, 79 S.W.3d 856, 859 (2002).

42. *Id.* at 190–221, 79 S.W.3d at 856–78.

43. *Id.* at 196, 79 S.W.3d at 860.

44. *Id.*, 79 S.W.3d at 860.

45. *Id.* at 197, 79 S.W.3d at 860–61.

46. *Id.* at 197, 79 S.W.3d at 861.

47. *Hollandsworth I*, 78 Ark. App. at 196, 79 S.W.3d at 861.

48. *Hollandsworth II*, 353 Ark. 470, 474, 109 S.W.3d 653, 656 (2003).

49. *See infra* Part III.A.

50. *See infra* Part III.A–C.

Arkansas Court of Appeals in 1994.<sup>51</sup> Finally, the section explores the Arkansas Supreme Court's recent treatment of relocation disputes.<sup>52</sup>

#### A. Two Standards: A Material Change of Circumstances and the Tender Years Doctrine

At the beginning of the twentieth century, relocation disputes manifested themselves in child-custody modification petitions in which one parent would file a child-custody modification petition either to keep the child from moving away from him/her or to be able to move the child with him/her.<sup>53</sup> The Arkansas Supreme Court first addressed a child-custody modification request motivated by a parent's desired relocation of the child in the 1916 decision *Weatherton v. Taylor*.<sup>54</sup> In that opinion, the court relied on a 1901 Washington case, *Koontz v. Koontz*,<sup>55</sup> and established what would come to be known as the "material change of circumstances" standard.<sup>56</sup> The court held that a court cannot modify custody absent some proof showing a change in circumstances from those that existed at the time of the original custody order, implying that absent such proof the custodial parent can move wherever he or she desires.<sup>57</sup> The court, however, put forth no bright line rule to use when determining if the circumstances have changed enough to warrant custody modification; it only listed some possible examples.<sup>58</sup>

In addition to the "material change" doctrine, the court also came to rely on the "tender years" doctrine in adjudicating child-custody modification petitions motivated by the relocation of the custodial parent.<sup>59</sup> The "tender years" doctrine rested upon the premise that young children need to be with their mother until they have grown out of the tender years.<sup>60</sup> This doctrine proved to be a successful tool for mothers litigating custody modification cases, even resulting in the 1948 Arkansas Supreme Court decision

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51. See *infra* Part III.D.

52. See *infra* Part III.E.

53. See discussion *infra* Part III.A.

54. 124 Ark. 580, 583, 187 S.W. 450, 452 (1916) ("There has been no decision of this court on the precise point . . .").

55. *Koontz v. Koontz*, 65 P. 546, 548 (Wash. 1901).

56. *Weatherton*, 124 Ark. at 584, 187 S.W. at 452 (citing *Koontz*, 65 P. at 548) (finding that a child-custody decree is conclusive upon all other courts unless there has been a material change in circumstances).

57. *Id.* at 581, 187 S.W. at 451.

58. *Id.*, 187 S.W. at 451 ("The parent having the custody of the children may marry; may become poor and unable properly to maintain and educate them; may become vicious and morally unfit to have the control of the children.").

59. *Gibson v. Gibson*, 156 Ark. 30, 33, 245 S.W. 32, 33 (1922) (holding that because of their young age, the children should have a mother's care and attention).

60. *Riddle v. Riddle*, 28 Ark. App. 344, 347, 775 S.W.2d 513, 516 (1989).

*Nutt v. Nutt*,<sup>61</sup> in which the court changed custody from the custodial father to the noncustodial mother.<sup>62</sup> The court reasoned that because the mother was moving as far away as New York City, the young child, in the midst of her tender years, should not be that far from her mother.<sup>63</sup>

Subsequent to the development and application of the "material change of circumstances" and "tender years" doctrines, the Arkansas Supreme Court began to consider the rights of both parents.<sup>64</sup> In the 1952 *Sage v. Sage*<sup>65</sup> decision, the Arkansas court granted custody to the father when the custodial mother decided to move out of Arkansas, partly on the grounds that the proposed move would interfere with the noncustodial father's right to visitation.<sup>66</sup> Two years later, however, in the largely cited 1954 *Antonacci v. Antonacci*<sup>67</sup> opinion, the Arkansas Supreme Court emphasized the right of the custodial parent who desires to move out of the state, noting that the court would not require that parent to be a "prisoner" of the state.<sup>68</sup>

At this point in the court's history, the Arkansas Supreme Court applied child-custody modification standards to relocation disputes, thereby implying that the burden of proof in relocation disputes was the same as the burden of proof in child-custody modification cases: requiring the noncus-

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61. 214 Ark. 24, 33, 214 S.W.2d 366, 371 (1948).

62. *Id.* at 25, 33, 214 S.W.2d at 367, 371.

63. *Id.* at 33, 214 S.W.2d at 371. While the court's holding in this case appears quite strange, the facts of this case are even stranger, including a series of parental attempts to "steal" the child away from the other parent. *Id.* at 25-29, 214 S.W.2d at 367-71. The mother first moved to New York with the child while the father was serving in the military overseas. *Id.* at 25-26, 214 S.W.2d at 367. The father then went to New York and, under the auspices of an afternoon visit to the zoo, he left New York with the child and returned to Arkansas. *Id.* at 27, 214 S.W.2d at 367. The mother then attempted to steal the child back from the father's parents, resulting in a boxing match with the child's grandfather. *Id.* at 29, 214 S.W.2d at 368. A Chancellor then awarded the father custody. *Id.*, 214 S.W.2d at 369. Ultimately, the Arkansas Supreme Court found that although the actions of both parents were contemptible, the mother had never abandoned the child but instead had acted frantically to get custody of the child and so, in light of the child's tender age, the child should be with her mother. *Id.* at 33, 214 S.W.2d at 371.

64. See discussion *infra* Part III.A.

65. 219 Ark. 853, 245 S.W.2d 398 (1952).

66. *Id.* at 857, 245 S.W.2d at 400 (holding that by removing the children from the state without permission, the mother had deprived the father of his natural and legal rights).

67. 222 Ark. 881, 263 S.W.2d 484 (1954).

68. *Id.* at 883, 263 S.W.2d at 485-86 ("We do not think that the Chancellor erred in refusing to require appellee to remain somewhat a prisoner in Arkansas because of the unfortunate divorce proceeding."). The facts in this case were not representative of a typical relocation case in that the custodial parent and child in this case had actually established a home in California following the divorce without objection and had employment in California. *Id.* at 882, 263 S.W.2d at 485. The custodial parent briefly returned to Arkansas, whereupon the father instituted a proceeding for change of custody and she was therefore restrained from returning with the child to their already established home in California. *Id.*, 263 S.W.2d at 485.

todial parent to show that relocation is a “material change in circumstances.”<sup>69</sup> A petition for child-custody modification, therefore, was the only legal option the noncustodial parent could exercise to prevent the custodial parent’s relocation with the child (although the noncustodial mother could also utilize the “tender years” doctrine under certain circumstances).<sup>70</sup>

## B. The *Ising* Holding and the Years that Follow

The Arkansas Supreme Court attempted to clarify relocation law in its 1960 *Ising v. Ward*<sup>71</sup> decision, holding that “the parent having custody of a child is ordinarily entitled to move to another state and to take the child to the new domicile.”<sup>72</sup> The court also reiterated its previously stated holding in *Antonacci* that the court would not require the custodial parent to remain a “prisoner” in the state.<sup>73</sup> The decision was also motivated in part by the “tender years” doctrine.<sup>74</sup>

Although the *Ising* holding seemed to indicate a move towards a presumption in favor of custodial parents, the three dissenters recognized that the obligations of parenthood might trump some individual rights of the custodial parent.<sup>75</sup> Eight years later in *Walter v. Holman*,<sup>76</sup> the Arkansas Supreme Court reaffirmed the *Ising* holding, restating that the custodial parent is entitled to move to another state with the child.<sup>77</sup> The *Walter* decision, however, not only incorporated the majority holding from *Ising* but also borrowed an argument from the *Ising* dissent concerning the obligations of parenthood, indicating that the court was struggling to find a standard that would provide a fair balance of the competing interests in a relocation dispute.<sup>78</sup>

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69. See discussion *supra* Part III.A.

70. See discussion *supra* Part III.A.

71. 231 Ark. 767, 332 S.W.2d 495 (1960).

72. *Id.* at 768, 332 S.W.2d at 495.

73. *Id.*, 332 S.W.2d at 495 (citing *Antonacci*, 222 Ark. at 881, 263 S.W.2d at 484).

74. *Id.* at 770, 332 S.W.2d at 497 (commenting that “the normal love of a parent, especially of a mother, for her child provides the best possible assurance that the infant will not be needlessly exposed to danger”).

75. *Id.* at 771, 332 S.W.2d at 497 (McFaddin, J., dissenting) (stating that, “the mother’s first duty is to her child . . . . The obligations of her parenthood should be held to impose a superior duty on the mother.”).

76. 245 Ark. 173, 431 S.W.2d 468 (1968).

77. *Id.* at 177, 431 S.W.2d at 471 (citing *Ward*, 231 Ark. at 767, 332 S.W.2d at 495).

78. *Id.* at 178, 431 S.W.2d at 471. The majority acknowledged the fact that it will be necessary for at least one parent to forfeit some individual rights to the companionship of their children when a court grants a divorce decree. *Id.*, 431 S.W.2d at 471.



### C. Don't Try a Little Tenderness

The next significant contribution to relocation law came with the abolishment of the "tender years" doctrine by both statute<sup>79</sup> and judicial decree.<sup>80</sup> With the abolition, the Arkansas courts knew that they could not consider the gender of the litigating parties in resolution of relocation disputes.<sup>81</sup> At this point in the court's history, therefore, family law practitioners and domestic relations courts were left with the *Ising* holding and the "material change of circumstances" standard as guideposts on the road to relocation dispute resolution.<sup>82</sup>

### D. The Need for a Clearer Standard: The Arkansas Court of Appeals Takes a *Staab* at It

In 1994 the Arkansas Court of Appeals issued the *Staab v. Hurst*<sup>83</sup> en banc ruling that provided the courts with an analytical framework within which relocation disputes could be resolved, independent of the standards that govern child-custody modification.<sup>84</sup>

In *Staab*, the custodial mother desired to move from Arkansas to Texas with her fifteen month-old daughter.<sup>85</sup> The daughter's father opposed the move, arguing that it would effectively be a denial of his visitation rights because of the increased geographical distance.<sup>86</sup>

The *Staab* court recognized that the Arkansas Supreme Court had said little since holding in *Ising* that "the parent having custody of a child is ordinarily entitled to move to another state and to take the child to the new domicile."<sup>87</sup> The Arkansas Court of Appeals found that the standard must be more specific to relocation disputes and that "the determination of a child's best interests cannot be made in a vacuum."<sup>88</sup> Furthermore, the appellate court recognized that the standards that govern relocation disputes are distinguishable from those that govern child-custody cases and visitation cases.<sup>89</sup>

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79. See ARK. CODE ANN. § 9-13-101(a)(1) (LEXIS Supp. 2003).

80. Riddle v. Riddle, 28 Ark. App. 344, 347, 775 S.W.2d 513, 516 (1989).

81. *Id.*, 775 S.W.2d at 516.

82. See discussion *supra* Part III.A-C.

83. 44 Ark. App. 128, 868 S.W.2d 517 (1994).

84. *Id.* at 133, 868 S.W.2d at 519.

85. *Id.* at 130, 868 S.W.2d at 517.

86. *Id.*, 868 S.W.2d at 517-18.

87. *Id.* at 132-33, 868 S.W.2d at 519 (citing *Ising v. Ward*, 231 Ark. 767, 332 S.W.2d 495 (1960)).

88. *Id.* at 133, 868 S.W.2d at 519.

89. *Staab*, 44 Ark. App. at 133, 868 S.W.2d at 519.

The *Staab* court then established a two-prong standard for relocation dispute resolution modeled after those set forth in the New Jersey case *D'Onofrio v. D'Onofrio*,<sup>90</sup> the leading relocation case at the time.<sup>91</sup> First, the Arkansas Court of Appeals held that if the custodial parent seeks to move the child to a place that is so geographically distant that it would render weekly visitation impractical, the custodial parent should have the threshold burden of proving that the move will result in some "real advantage" to the family unit.<sup>92</sup> Second, the court held that once the custodial parent has met this threshold burden of proving a "real advantage," the court should then consider a number of factors in deciding whether to allow the custodial parent to relocate with the child.<sup>93</sup> The factors include: (1) the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children; (2) the integrity of the motives of the custodial parent in seeking the move in order to determine whether the removal is inspired primarily by the desire to defeat or frustrate visitation by the non-custodial parent; (3) whether the custodial parent is likely to comply with substitute visitation orders; (4) the integrity of the non-custodial parent's motives in resisting the removal; and (5) whether, if the court allows the removal, there will be a realistic opportunity for visitation in lieu of the weekly pattern that can provide an adequate basis for preserving and fostering the parent relationship with the noncustodial parent.<sup>94</sup>

The Court of Appeals of Arkansas consistently followed *Staab*.<sup>95</sup> For example, in *Wilson v. Wilson*,<sup>96</sup> five years after *Staab*, the custodial mother desired to relocate with her children to California, and the noncustodial father objected.<sup>97</sup> In application of *Staab*, the court held that the custodial parent bears the threshold burden to prove some advantage to the family unit.<sup>98</sup> Finding that the custodial mother was found to have met that threshold, the court then employed the *Staab* factors.<sup>99</sup> In illustration of how the application of these factors worked, the *Wilson* court first found that the custodial parent desired to relocate for employment purposes (purposes that would enhance the financial position of the custodial parent's life and the lives of

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90. *Id.* at 134, 868 S.W.2d at 520 (citing *D'Onofrio v. D'Onofrio*, 365 A.2d 27 (N.J. Super Ct. App. Div. 1976)).

91. *Id.* at 134, 868 S.W.2d at 520.

92. *Id.*, 868 S.W.2d at 520.

93. *Id.*, 868 S.W.2d at 520.

94. *Id.*, 868 S.W.2d at 520.

95. See discussion *infra* Part III.D.

96. 67 Ark. App. 48, 52, 991 S.W.2d 647, 649 (1999).

97. *Id.* at 52, 991 S.W.2d at 649.

98. *Id.*, 991 S.W.2d at 649.

99. *Id.* at 52-53, 991 S.W.2d at 650.

the children).<sup>100</sup> Second, the court found that the custodial parent's motive in seeking to relocate to California was not an underhanded attempt to impede the noncustodial parent's visitation with the children.<sup>101</sup> In application of the third factor, the decision stated that the custodial parent would not interfere with future visitation rights.<sup>102</sup> Fourth, it was found that the noncustodial parent's motive in resisting the removal was questionable.<sup>103</sup> Fifth, the court concluded that the visitation schedule could be modified so as to preserve and foster the parental relationship between the children and the noncustodial parent.<sup>104</sup> The court then affirmed the lower court's decision and allowed the custodial parent to relocate to California with the children.<sup>105</sup>

In *Hickmon v. Hickmon*,<sup>106</sup> decided in 2000, the Arkansas Court of Appeals again applied *Staab*.<sup>107</sup> This time, however, the court prohibited the custodial parent's move with the children from Arkansas to Arizona, finding that—in light of the noncustodial parent's high level of involvement in the child's life—the custodial parent did not meet the threshold burden of proving some “real advantage” to the family unit.<sup>108</sup>

In another application of the *Staab* analysis, the Arkansas Court of Appeals has allowed relocation from Fayetteville, Arkansas, to El Dorado, Arkansas, to allow the custodial parent to take advantage of a job opportunity.<sup>109</sup> Additionally, the court allowed a custodial parent to move from Arkansas to Florida because the custodial parent had a job opportunity in Florida and would be near his mother.<sup>110</sup> In another application of *Staab*, the court allowed the custodial parent to move from Arkansas to Texas because the custodial parent had found a better paying job with less travel.<sup>111</sup> The Arkansas Court of Appeals has also denied relocation under *Staab* when, for example, the custodial parent's motive lacked integrity and the evidence supported a finding that the custodial parent would not comply with visitation orders.<sup>112</sup>

*Staab* provided relocation disputes with their own standards independent of those that govern child-custody cases, and the Arkansas Court of Ap-

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100. *Id.*, 991 S.W.2d at 650.

101. *Id.* at 53, 991 S.W.2d at 650.

102. *Wilson*, 67 Ark. App. at 53, 991 S.W.2d at 650.

103. *Id.* at 54, 991 S.W.2d at 650.

104. *Id.*, 991 S.W.2d at 650.

105. *Id.*, 991 S.W.2d at 650.

106. 70 Ark. App. 438, 19 S.W.3d 624 (2000).

107. *Id.* at 445, 19 S.W.3d at 629.

108. *Id.*, 19 S.W.3d at 629.

109. *Hass v. Hass*, 74 Ark. App. 49, 44 S.W.3d 773 (2001).

110. *Wagner v. Wagner*, 74 Ark. App. 135, 45 S.W.3d 852 (2001).

111. *Friedrich v. Bevis*, 69 Ark. App. 56, 9 S.W.3d 556 (2000).

112. *Deluca v. Stapleton*, 79 Ark. App. 138, 84 S.W.3d 892 (2002).

peals has explicitly recognized that independence as recent as 2002.<sup>113</sup> The appellate court has also made it clear that the *Staab* analysis has no place in a change of custody case, conversely intimating that a child-custody analysis has no place in relocation disputes.<sup>114</sup>

#### E. The Arkansas Supreme Court's Avoidance of the *Staab* Approach

Although the Arkansas Court of Appeals has been faithful to the new standards set forth in *Staab*, the Arkansas Supreme Court has proved to be less receptive to the idea of treating relocation disputes as an issue apart from child-custody issues.<sup>115</sup> In the 1996 *Jones v. Jones*<sup>116</sup> decision—two years after the Court of Appeals decided *Staab*—the Arkansas Supreme Court decided a child-custody modification petition filed by the noncustodial father to keep the custodial mother from relocating with the child from Conway to Little Rock.<sup>117</sup> In addressing what was practically a relocation case, the *Jones* court did not analyze the move under *Staab* but instead applied the child-custody modification standard—a “material change in circumstances”—to resolve all facets of the case, including the relocation.<sup>118</sup> The court reiterated the standard that governed child-custody modification cases, stating “the party seeking modification of the child-custody order has the burden of showing a material change of circumstances.”<sup>119</sup>

The court did acknowledge *Staab* in 2002 but again refused to apply it in *Lewellyn v. Lewellyn*.<sup>120</sup> In that case, the custodial parent (mother) sought permission—despite a do-not-relocate provision in the divorce decree—to relocate with the children to Fayetteville, Arkansas, from Russellville, Arkansas.<sup>121</sup> The father counterclaimed asking for sole custody of the chil-

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113. *Vo v. Vo*, 78 Ark. App. 134, 141, 79 S.W.3d 388, 392 (2002). The court recognized that the standard governing a petition to relocate is different from the standard governing custody changes. *Id.*, 79 S.W.3d at 392.

114. *See Riley v. Riley*, 45 Ark. App. 165, 168–69, 873 S.W.2d 564, 567 (1994) (“[T]he holding in *Staab* has no relevance in a change of custody case. There was no petition by the non-custodial parent for a change of custody [in *Staab*]. The sole issue was whether the custodial parent’s petition to move from Arkansas with the minor child should be granted.”).

115. *See discussion infra* Part III.E.

116. 326 Ark. 481, 931 S.W.2d 767 (1996).

117. *Id.* at 484, 931 S.W.2d at 768. The distance from Conway to Little Rock is approximately twenty-five miles. RAND MCNALLY, THE 2004 ROAD ATLAS: UNITED STATES, CANADA, AND MEXICO 10 (Rand McNally & Company 2004).

118. *Jones*, 326 Ark. at 487–91, 931 S.W.2d at 770–72.

119. *Id.*, 931 S.W.2d at 770–72.

120. *Lewellyn v. Lewellyn*, 351 Ark. 346, 93 S.W.3d 681 (2002).

121. *Id.* at 349–50, 93 S.W.3d at 682–83. The distance from Fayetteville, Arkansas, to Russellville, Arkansas, is approximately one hundred ten miles. RAND MCNALLY, *supra* note 117, at 10.

dren.<sup>122</sup> The trial court analyzed the case as a change-of-custody case and granted the father sole custody.<sup>123</sup> The Court of Appeals reversed and remanded the case, stating that the case was not as a change-of-custody case but a relocation case and should therefore be evaluated under the factors adopted in *Staab*.<sup>124</sup>

The Arkansas Supreme Court then reviewed the case *de novo*.<sup>125</sup> Upon review, the court used the "material change in circumstances" standard instead of the *Staab* standard as was explicitly suggested by the Court of Appeals.<sup>126</sup> The Arkansas Supreme Court held that *Staab* was irrelevant.<sup>127</sup> The Arkansas Supreme Court distinguished *Lewellyn* from *Staab*, explaining that *Staab* was irrelevant because it only applies when the facts of the case indicate that relocation might make visitation impossible and, in this case, visitation was not made impossible.<sup>128</sup> Thus, the Arkansas Supreme Court was able to avoid *Staab* by strictly applying it only to the extreme circumstances where visitation is deemed to have been made impossible by the geographic distance involved in the move.<sup>129</sup>

In 2003, *Hollandsworth v. Knyzewski*<sup>130</sup> presented the Arkansas Supreme Court with another opportunity to address *Staab* and Arkansas relocation law.<sup>131</sup> The Arkansas Supreme Court accepted that opportunity, citing confusion about relocation law throughout the bench, bar, and parties.<sup>132</sup>

#### IV. REASONING

In *Hollandsworth v. Knyzewski*,<sup>133</sup> the Arkansas Supreme Court rejected the use of the relocation dispute standard previously espoused by the Arkansas Court of Appeals in *Staab*.<sup>134</sup> The court, instead, announced a presumption in favor of relocation for custodial parents and placed the burden to rebut that presumption on the noncustodial parent.<sup>135</sup> The court also held that "[t]he custodial parent no longer has the responsibility to prove a

122. *Lewellyn*, 351 Ark. at 350, 93 S.W.3d at 683.

123. *Id.* at 353, 93 S.W.3d at 685. The trial court concluded that it was in the best interest of the children to grant the father custody because a relocation to a different area would be traumatic for the children. *Id.*, 93 S.W.3d at 685.

124. *Id.*, 93 S.W.3d at 685.

125. *Id.* at 354, 93 S.W.3d at 685.

126. *Id.* at 355–56, 93 S.W.3d at 686–87.

127. *Id.* at 357, 93 S.W.3d at 688.

128. *Lewellyn*, 351 Ark. at 357, 93 S.W.3d at 688.

129. *Id.*, 93 S.W.3d at 688.

130. 353 Ark. 470, 109 S.W.3d 653 (2003).

131. *Id.*, 109 S.W.3d at 653.

132. *Id.* at 476, 109 S.W.3d at 657.

133. *Id.* at 470, 109 S.W.3d at 657.

134. *Id.* at 485, 109 S.W.3d at 663.

135. *Id.*, 109 S.W.3d at 663.

real advantage to herself or himself and to the children in relocating.”<sup>136</sup> Additionally, the decision announced that relocation alone does not constitute a material change of circumstances.<sup>137</sup>

In support of its holding, the court provided a brief discussion on the mobility of modern society.<sup>138</sup> The court then conducted a cursory overview of the New Jersey courts’ approach to relocation disputes.<sup>139</sup> Following the New Jersey analysis, the court performed an examination of eight other states and their approaches to relocation disputes.<sup>140</sup> The court then shifted its analysis to the Arkansas cases and declined to adopt or apply the *Staab* criteria.<sup>141</sup> In rejection of *Staab* and adoption of a new mode of analysis, the court propounded four contentions: (1) modern society has attained a degree of mobility such that no move within the United States would make visitation impossible; (2) subsequent New Jersey cases have largely modified *D’Onofrio*, and, therefore, it is no longer a solid foundation upon which to base Arkansas relocation law; (3) there is a current trend to loosen the burdens of the custodial parent desiring to relocate; and (4) the *Staab* analysis is inconsistent with Arkansas precedent.<sup>142</sup>

#### A. Mobility of Modern Society

The Arkansas Supreme Court ruled in *Lewellyn* that *Staab* only applies when the relocation would render visitation impossible or impractical.<sup>143</sup> In *Hollandsworth II*, therefore, the court began its analysis by discussing the mobility of modern American society to suggest that with the increased mobility of the United States population, no distance of relocation would render visitation impractical or impossible.<sup>144</sup> The court found that one out of every five Americans changes his or her residence each year and that within four years of a divorce, one-fourth of all custodial mothers will move to a new location.<sup>145</sup> The opinion quoted the finding in the New Jersey case

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136. *Hollandsworth II*, 353 Ark. at 476, 109 S.W.3d at 657.

137. *Id.*, 109 S.W.3d at 657.

138. *Id.* at 476–84, 109 S.W.3d at 657–63.

139. *Id.*, 109 S.W.3d at 657–63. The *Hollandsworth II* decision rejected the Arkansas Court of Appeals’ *Staab* analysis. *Id.* at 484, 109 S.W.3d at 663. The *Staab* analysis relied heavily upon the 1976 New Jersey case, *D’Onofrio*; therefore, in rejection of *Staab*, the Arkansas Supreme Court examined New Jersey law as it has evolved since the 1976 case of *D’Onofrio*. *Id.* at 476–84, 109 S.W.3d at 657–63.

140. *Id.*, 109 S.W.3d at 657–63. The court examined Minnesota, Tennessee, New York, California, Colorado, Texas, North Carolina, and Wyoming. *Id.*, 109 S.W.3d at 657–63.

141. *Id.* at 483–86, 109 S.W.3d at 662–64.

142. *Hollandsworth II*, 353 Ark. at 476–84, 109 S.W.3d at 657–64.

143. *Lewellyn v. Lewellyn*, 351 Ark. 346, 354, 93 S.W.3d 681, 688 (2002).

144. *Hollandsworth II*, 353 Ark. at 476, 109 S.W.3d at 657.

145. *Id.*, 109 S.W.3d at 657 (citing Chris Ford, *Untying the Relocation Knot: Recent Developments and a Model for Change*, 7 COLUM. J. GENDER & L. 1, 7 (1997)).

*Baures v. Lewis*<sup>146</sup> that many courts have recently “reassessed the burden cast on custodial parents who desire to relocate with their children [and] reasons for the change include geographic mobility of the United States population . . . .”<sup>147</sup> After referring to these few findings, the court stated, without further elaboration, that American society has become more mobile, thereby implying that the modern mobility of society is of such an advanced degree that no distance of relocation would render visitation impractical and therefore, according to the court, the *Staab* analysis would never be useful.<sup>148</sup>

## B. The New Jersey Analysis

The Arkansas Supreme Court then turned its analysis to New Jersey law.<sup>149</sup> The standard adopted in *Staab* was largely based on the New Jersey case *D’Onofrio*.<sup>150</sup> To bolster its arguments that *Staab* is unfair to custodial parents and that *D’Onofrio* is no longer a reliable foundation for relocation law, the Arkansas Supreme Court examined New Jersey relocation law since *D’Onofrio*.<sup>151</sup>

In an attempt to advance the argument that *Staab* is unfair to custodial parents, the Arkansas Supreme Court began its analysis of the New Jersey cases with a discussion of the 1984 New Jersey *Cooper v. Cooper*<sup>152</sup> case, which was decided eight years after *D’Onofrio*.<sup>153</sup> Implying that there is a double standard for relocating parents, the Arkansas Supreme Court referred the finding in *Cooper* that a noncustodial parent is free to relocate despite the fact that his or her children continue to reside in the state from which the noncustodial parent is relocating.<sup>154</sup> Furthermore, the court found that the custodial parent could not prevent the noncustodial parent’s relocation even

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146. 770 A.2d 214, 222 (N.J. 2001).

147. *Hollandsworth II*, 353 Ark. at 477, 109 S.W.3d at 658 (citing *Baures*, 770 A.2d at 222).

148. *Id.*, 109 S.W.3d at 658 (“As our society has become more and more mobile . . .”).

149. *Id.* at 476–86, 109 S.W.3d at 657–63.

150. *D’Onofrio v. D’Onofrio*, 365 A.2d 27, 30 (N.J. 1976). See also discussion *supra* Part III.D.

151. *Hollandsworth II*, 353 Ark. at 476–86, 109 S.W.3d at 657–63. In its examination of New Jersey relocation law, the Arkansas Supreme Court’s argument closely resembled Judge Bird’s concurrence in *Hollandsworth I*, 78 Ark. App. 190, 201–09, 79 S.W.3d 856, 863–68 (2002) (Bird, J., concurring). Judge Bird found that the *Staab* court did not acknowledge the fact that *D’Onofrio*, the case on which the *Staab* court relied, had since undergone substantial modifications by the New Jersey Supreme Court. *Id.*, 79 S.W.3d at 864–68. Judge Bird disagreed with the fact that the *Staab* court chose to adopt the law of a New Jersey lower court that had been since modified by New Jersey’s highest court. *Id.*, 79 S.W.3d at 864–68.

152. 491 A.2d 606, 613 (N.J. 1984).

153. *Hollandsworth II*, 353 Ark. at 476, 109 S.W.3d at 657.

154. *Id.*, 109 S.W.3d at 657–58 (citing *Cooper*, 491 A.2d at 613).

though it may disrupt the child's relationship with the noncustodial parent.<sup>155</sup> The court then cited to *D'Onofrio*, stating that the custodial parent, just as the noncustodial parent, is entitled to seek a better life for herself or himself.<sup>156</sup>

Next, the Arkansas Supreme Court reasoned that the New Jersey cases have either modified or abrogated *D'Onofrio* (upon which *Staab* relied).<sup>157</sup> The court noted that the 1984 New Jersey *Cooper* decision reaffirmed *D'Onofrio* in part but also modified New Jersey law.<sup>158</sup> The *Cooper* decision held that once the custodial parent meets the threshold requirement of proof that the relocation has a "real advantage" to the custodial parent and the children, the burden shifts to the noncustodial parent to show that his or her right to a relationship with the child is unreasonably and adversely affected (unlike the *D'Onofrio* analysis in which the burden never shifts to the noncustodial parent).<sup>159</sup> The Arkansas Supreme Court further emphasized *Cooper's* finding that once the burden shifts to the noncustodial parent, he or she must show more than mere inconvenience to overcome a custodial parent's right to remove the children.<sup>160</sup> The court then noted that the 1988 New Jersey decision *Holder v. Polanski*<sup>161</sup> lowered the custodial parent's threshold requirement from proving a "real advantage" to "any sincere, good-faith reason."<sup>162</sup>

In conclusion of its examination of New Jersey law, the Arkansas Supreme Court mentioned that the 2001 New Jersey Supreme Court ignored the *D'Onofrio* factors and laid out twelve new factors to determine whether or not to allow removal once the custodial parent has met *Holder's* "good faith" threshold requirement.<sup>163</sup> The court then noted that the *Baures* decision reiterated the shifting burden analysis found in *Cooper*, implying that New Jersey relocation law now contains a shifting burden analysis coupled with a new factored analysis and therefore no longer adheres to the analysis set forth in *D'Onofrio*.<sup>164</sup>

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155. *Id.* at 476, 109 S.W.3d at 657-58.

156. *Id.* at 477, 109 S.W.3d at 658 (citing *D'Onofrio v. D'Onofrio*, 365 A.2d 27, 30 (N.J. 1976)). The court's reference to this statement out of *D'Onofrio* did not cite the entire quote, which included at the end, "provided that the paternal interest can continue to be accommodated." *D'Onofrio*, 365 A.2d at 30.

157. *Hollandsworth II*, 353 Ark. at 480-83, 109 S.W.3d at 660-62.

158. *Id.* at 476-77, 109 S.W.3d at 657-58.

159. *Id.*, 109 S.W.3d at 657-58.

160. *Id.* at 481, 109 S.W.3d at 661.

161. 544 A.2d 852 (1988).

162. *Hollandsworth II*, 353 Ark. at 481, 109 S.W.3d at 661 (citing *Holder*, 544 A.2d at 852).

163. *Id.* at 481, 109 S.W.3d at 661 (citing *Baures v. Lewis*, 770 A.2d 214 (1988)).

164. *Id.* at 483, 109 S.W.3d at 662.



Additionally, the Arkansas Supreme Court briefly considered the psychological perspective.<sup>165</sup> The court referenced the New Jersey Supreme Court's finding that social science has generally confirmed that what is good for the custodial parent is also good for the child.<sup>166</sup>

### C. The Approach of Other States

The Arkansas Supreme Court next asserted that there is a national trend of lessening the custodial parent's legal obstacles when desiring to relocate.<sup>167</sup> The court first stated that "some states that have traditionally been opposed to custodial-parent relocation have recently adjusted their criteria to make custodial parent relocation more lenient."<sup>168</sup>

In support of this national trend, the opinion then cited the various jurisdictions that have recently moved in a direction favoring the custodial parent's right to relocate.<sup>169</sup> The opinion notes that Minnesota, in 1983, and Tennessee, in 1993, held that the custodial parent is presumptively entitled to relocate.<sup>170</sup> The Arkansas Supreme Court recognized that New York, a jurisdiction that at one time had the toughest laws against custodial parent relocation, held in 1996 that the court should be free to consider and give appropriate weight to all of the relevant factors in a best interests of the child analysis.<sup>171</sup> Furthermore, the Arkansas Supreme Court stated that California, Colorado, and Wyoming all recognize the presumptive right of the custodial parent to relocate.<sup>172</sup> Finally, the court noted that Texas and North Carolina courts have held that relocation will not, in and of itself, establish a material change of circumstances.<sup>173</sup>

### D. The Arkansas Cases

Turning to the Arkansas cases, the court pointed out that it "has not been called upon to consider the accuracy of the Arkansas Court of Ap-

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165. *Id.* at 480, 109 S.W.3d at 660 (citing *Baures*, 770 A.2d at 214).

166. *Id.*, 109 S.W.3d at 660. The court gave the psychological perspective no further consideration. *Id.*, 109 S.W.3d at 660.

167. *Id.* at 478, 109 S.W.3d at 658.

168. *Hollandsworth II*, 353 Ark. at 478, 109 S.W.3d at 658.

169. *Id.* at 478-480, 109 S.W.3d at 658-61.

170. *Id.* at 477, 109 S.W.3d at 658 (citing *Auge v. Auge*, 334 N.W.2d 393 (Minn. 1983); *Taylor v. Taylor*, 849 S.W.2d 319 (Tenn. 1993)).

171. *Id.* at 478, 109 S.W.3d at 658 (citing *Tropea v. Tropea*, 665 N.E.2d 145 (N.Y. 1996)).

172. *Id.*, 109 S.W.3d at 659 (citing respectively *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996); *In re Marriage of Francis*, 919 P.2d 776 (Colo. 1996); *Love v. Love*, 851 P.2d 1283 (Wyo. 1993)).

173. *Id.*, 109 S.W.3d at 659 (citing *Bates v. Tesar*, 81 S.W.3d 411 (Tex. Ct. App. 2002); *Gordon v. Gordon*, 265 S.E.2d 425 (1980)).

peal's adoption of the criteria established in *Staab*.”<sup>174</sup> The Arkansas Supreme Court then found that *Staab* was inconsistent with Arkansas precedent.<sup>175</sup>

In support of its argument, the court found that the first prong of the *Staab* analysis, which required the custodial parent to prove a “real advantage” of the move, essentially set a presumption that the move was against the best interests of the child and that presumption is inconsistent with Arkansas precedent.<sup>176</sup> The court found that the first prong of the *Staab* analysis required the custodial parent to enter court and rebut this presumption before he or she could retain custody in light of the desired move.<sup>177</sup> It follows, the court reasoned, that if he or she did not rebut this presumption that the move was against the best interests of the child, the practical effect is that he or she will lose custody of the child if he or she chooses to relocate.<sup>178</sup> Put another way, the court reasoned that if the custodial parent proceeded to relocate even though her relocation petition had been denied, he or she may not do so with the child and therefore, in a practical sense, custody would be modified simply because something the custodial parent desired to do was not in the best interests of the child.<sup>179</sup>

As such, this scenario would be a modification of custody based on a best interests of the child standard.<sup>180</sup> This was inconsistent, however, with the established precedent that custody modification requires meeting a higher standard than best interests of the child: to modify custody, the moving party must show that there has been a “material change in circumstances,” not just conduct a simple best interests of the child analysis.<sup>181</sup> The court, therefore, found the *Staab* analysis to be inconsistent with child-custody modification law.<sup>182</sup> The opinion did acknowledge, without further discussion, that the Arkansas Court of Appeals has stated that *Staab* applies only to the evaluation of relocation petitions, and not child-custody modification.<sup>183</sup>

In further support of the argument that *Staab* was contrary to Arkansas precedent, the Arkansas Supreme Court referred to the 1960 *Ising v. Ward*<sup>184</sup> holding that the custodial parent is “ordinarily entitled to move to

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174. *Hollandsworth II*, 353 Ark. at 483, 109 S.W.3d at 662.

175. *Id.*, 109 S.W.3d at 663.

176. *Id.*, 109 S.W.3d at 663.

177. *Id.*, 109 S.W.3d at 663.

178. *Id.*, 109 S.W.3d at 663.

179. *Id.*, 109 S.W.3d at 663.

180. *Hollandsworth II*, 353 Ark. at 483, 109 S.W.3d at 663.

181. *Id.*, 109 S.W.3d at 663 (citing *Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001)).

182. *Id.* at 478, 109 S.W.3d at 663.

183. *Id.*, 109 S.W.3d at 663 (citing *Riley v. Riley*, 45 Ark. App. 165, 873 S.W.2d 564 (1994)).

184. *Ising v. Ward*, 231 Ark. 767, 332 S.W.2d 495 (1960).

another state and to take the child to the new domicile."<sup>185</sup> The court bolstered its argument with reference to the 1954 *Antonacci* decision, in which the court stated that it would not require the mother to remain a "prisoner" in Arkansas.<sup>186</sup> The opinion also cited the 1968 *Walter v. Holman*<sup>187</sup> case in which the court noted that after divorce at least one parent must necessarily forfeit some individual rights to the constant companionship of the children.<sup>188</sup>

#### E. The Court's Conclusion

Following the examination of the modern mobility of American society, New Jersey law's modification and abrogation of *D'Onofrio*, the modern trend among the states towards a presumptive right to relocate, and the conflict between *Staab* and prior-existing Arkansas precedent, the court announced four new standards applicable to relocation disputes.<sup>189</sup> In pronouncement of the new law, the Arkansas Supreme Court stated the following: (1) relocation alone is not a material change of circumstances; (2) the presumption is in favor of relocation for custodial parents with primary custody; (3) the burden to rebut that presumption falls on the noncustodial parent; and (4) the custodial parent no longer has to prove a "real advantage" to herself or himself and to the children in relocating.<sup>190</sup> The court then applied these new standards to the facts at bar.<sup>191</sup>

The court then announced five factors to be taken into consideration in making a determination of the best interests of the child in a relocation dispute.<sup>192</sup> The factors are as follows: 1) the reason for the relocation; 2) the educational, health, and leisure opportunities available in the location where the custodial parent and children will relocate; 3) visitation and communication schedule for the noncustodial parent; 4) the effect of the move on the extended family relationships in the location where the custodial parent and children will relocate, as well as in Arkansas; and 5) preference of the child, including the age, maturity, and the reasons given by the child as to his or her preference.<sup>193</sup>

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185. *Hollandsworth II*, 353 Ark. at 484, 109 S.W.3d at 663.

186. *Id.*, 109 S.W.3d at 663; see *supra* note 68 and accompanying text as to why *Antonacci* is distinguishable from typical relocation disputes.

187. 245 Ark. 173, 431 S.W.2d 468 (1968).

188. *Hollandsworth II*, 353 Ark. at 484, 109 S.W.3d at 663 (citing *Walter*, 245 Ark. at 173, 431 S.W.2d at 468).

189. *Id.* at 484, 109 S.W.3d at 663-64.

190. *Id.*, 109 S.W.3d at 663.

191. *Id.*, 109 S.W.3d at 663-64.

192. *Id.*, 109 S.W.3d at 663-64.

193. *Id.*, 109 S.W.3d at 663-64.

In application of these new standards to the facts before it, the court held that Sheree Hollandsworth's reasons for relocating were valid.<sup>194</sup> Second, the court found no detrimental variance in the educational, health, and leisure opportunities for the children in Tennessee as opposed to Northwest Arkansas but instead that the children would benefit from the two-parent home in Tennessee.<sup>195</sup> Third, the court reasoned that because Clarksville, Tennessee, is "only five-hundred miles away," the noncustodial parent could have adequate visitation to maintain a respectable relationship with the children.<sup>196</sup> Fourth, the court acknowledged that the children are surrounded by extended family in Northwest Arkansas and found this to be a valid consideration.<sup>197</sup> Ultimately, however, the court stated that Keith, the father, had failed to establish a "material change in circumstances" and had failed to meet his burden to rebut the newly adopted presumption in favor of relocation.<sup>198</sup> The Arkansas Supreme Court thus reversed the trial court's ruling and held in favor of the mother, Sheree, and thereby allowed her desired relocation with the children to Tennessee.<sup>199</sup>

#### V. SIGNIFICANCE

The significance of the Arkansas Supreme Court's decision in *Hollandsworth v. Knyzewski*<sup>200</sup> is first found in the fact that this case marks only the second time in the court's history and the first time in forty-three years (since *Ising v. Ward*<sup>201</sup>) that the Arkansas Supreme Court has directly addressed relocation law in Arkansas.<sup>202</sup> The opinion's ramifications for family law practitioners, its generation of several problems, and its creation of societal dangers further illustrate the significance of this decision.<sup>203</sup> First, it leaves family law practitioners with confusion as to when to apply *Staab*.<sup>204</sup> Second, *Hollandsworth II* rejected *Staab* partly on reasoning supported by the faulty assumption that *Staab* had the power to modify child-custody.<sup>205</sup> Third, the decision creates a facially illogical precedent.<sup>206</sup> Fourth, the ruling creates a societal danger by potentially exacerbating the noncustodial

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194. *Hollandsworth II*, 353 Ark. at 484, 109 S.W.3d at 664.

195. *Id.*, 109 S.W.3d at 664.

196. *Id.*, 109 S.W.3d at 664.

197. *Id.*, 109 S.W.3d at 664.

198. *Id.*, 109 S.W.3d at 664.

199. *Id.*, 109 S.W.3d at 664.

200. 353 Ark. 470, 109 S.W.3d 653 (2003).

201. *Ising v. Ward*, 231 Ark. 767, 332 S.W.2d 495 (1960).

202. *See supra* Part III.

203. *See infra* Part V.A–E.

204. *See infra* Part V.A.

205. *See infra* Part V.B.

206. *See infra* Part V.C.

parent's withdrawal from his or her child's life.<sup>207</sup> Fifth, the court fails to account for the psychological ramifications of its decision.<sup>208</sup> Finally, the court could have just as effectively remedied the perceived *Staab* inconsistency without creating a presumption in favor of the custodial parent's right to relocate.<sup>209</sup>

#### A. The Impact on Family Law Practitioners in Arkansas

Because the Arkansas Supreme Court merely declined to use *Staab* and did not explicitly overrule the decision, family law practitioners must decide when, if ever, to employ the *Staab* analysis. By implication of its reasoning in *Hollandsworth II* and less recently in *Lewellyn*, however, the Arkansas Supreme Court seems to have answered that question.<sup>210</sup> The court has held that the application of *Staab* is dependent upon the geographic distance involved in the relocation, not on any disapproval of *Staab* itself.<sup>211</sup> In *Lewellyn*, the Arkansas Supreme Court found *Staab* to be irrelevant, holding that *Staab* only applies when the facts of the case indicate that relocation might be made impossible because of the degree of geographical separation.<sup>212</sup> In accordance with this view, the court in *Hollandsworth II* referred to the relocation as "only five-hundred miles away" and thereby saw no need to apply the *Staab* analysis.<sup>213</sup> The court, therefore, seems to have answered the question, implying that *Staab* is applicable only when the geographic distance is of such a length as to trigger *Staab*. It follows, then, that family law practitioners will now have to decide when the geographic distance is so great as to trigger a *Staab* analysis instead of using the new analysis espoused by the Arkansas Supreme Court in *Hollandsworth II*. At first glance, the Arkansas Supreme Court's reasoning seems to answer this question as well.

The court implied in *Hollandsworth II* that American society has become so mobile that no distance of relocation would render visitation impractical.<sup>214</sup> Thus, the court has said that *Staab* is triggered only when the distance of the move makes visitation impractical and impossible, and because no distance is impractical because of the increased mobility of American society, *Staab* is never applicable.

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207. See *infra* Part V.D.

208. See *infra* Part V.E.

209. See *infra* Part V.F.

210. See discussion *supra* Part III.E.

211. See discussion *supra* Part III.E.

212. See *Lewellyn v. Lewellyn*, 351 Ark. 346, 354, 93 S.W.3d 681, 688 (2002).

213. *Hollandsworth II*, 353 Ark. 470, 486, 109 S.W.3d 653, 664 (2003).

214. See discussion *supra* Part IV.A.

This answer to the practitioner's dilemma seems to overstate the mobility of America's citizenry. The expenses of travel simply do not permit any and every noncustodial parent to visit his or her child in any part of the United States where the child might live enough to maintain a healthy relationship with that child; the Center for Urban Transportation Research has found, "income is one of the key factors in driving travel demand."<sup>215</sup> So, with the economic concern in the picture, the family law practitioner is left with his or her original question: At what distance does visitation become impractical or impossible so as to trigger a *Staab* analysis? This question is not susceptible to a bright line answer because the distance of impracticality varies from income to income, person to person, and family to family. The family law practitioner, therefore, is still left with confusion as to when, if ever, to apply a *Staab* analysis.

#### B. *Staab* Not as Strong as It Looks

The court rejected *Staab* partly on reasoning supported by the assumption that *Staab* was erroneously resulting in child-custody modification and therefore was inconsistent with existing Arkansas child-custody law.<sup>216</sup> This reasoning is flawed, however, because the *Staab* analysis could not *legally* result in child-custody modification.<sup>217</sup>

The Arkansas Court of Appeals explicitly stated that courts are not to apply *Staab* so as to result in child-custody modification.<sup>218</sup> In *Riley*, the appellate court stated that the *Staab* analysis was never intended to govern or result in child-custody modification but, rather, was strictly limited to granting or denying the custodial parent's petition to relocate.<sup>219</sup> Therefore, to allow a *Staab* analysis to result in child-custody modification would be a misapplication of *Staab*, as the trial court did in this case when it granted Keith's modification of custody petition.<sup>220</sup>

The fact that a *Staab* application can be abused to yield a child-custody modification does not necessarily make *Staab* inconsistent with child-custody law, rather it makes that abused application inconsistent with the law. The Arkansas Supreme Court mentioned this argument but did not address it.<sup>221</sup> The material change in circumstances standard and the *Staab*

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215. Steven E. Polzin et al., *The Case for Moderate Growth in Vehicle Miles of Travel: A Critical Juncture in U.S. Travel Behavior Trends*, U.S. Dept. of Transportation, at <http://nhts.oml.gov/2001/index.shtml> (last visited Sept. 2003).

216. See discussion *supra* Part IV.D.

217. See discussion *infra* Part V.B.

218. *Riley v. Riley*, 45 Ark. App. 165, 168, 873 S.W.2d 564, 567 (1994).

219. *Id.*, 873 S.W.2d at 567.

220. *Hollandsworth I*, 78 Ark. App. 190, 194, 79 S.W.3d 856, 859 (2002).

221. *Hollandsworth II*, 353 Ark. 470, 484, 109 S.W.3d 653, 663 (2003).

analysis can therefore exist in harmony because they apply to two different realms of family law, child-custody modification and relocation requests, respectively, and the courts should strictly apply those doctrines in accordance with those designations.

### C. Not Living in a "Material" World

The announcement that relocation cannot constitute a material change in circumstances, without providing further explanation, defies common sense and establishes an unjust and illogical precedent.<sup>222</sup> The Arkansas Supreme Court provided no explanation in *Hollandsworth II* as to why moving the children's residence five-hundred miles away from their father was not a material change in circumstances; the court only stated that the father could maintain a respectable relationship with his children from that distance.<sup>223</sup> The court did not elaborate on what constitutes a "respectable" relationship.<sup>224</sup>

Contrary to the court's view, relocation is a change in circumstance that can rise to a level of materiality.<sup>225</sup> The American Heritage Dictionary and Webster's Dictionary respectively define "material" as "relevant"<sup>226</sup> and "important."<sup>227</sup> Black's law dictionary defines material as "significant."<sup>228</sup> Relocating to a new city or state cannot properly be classified as an irrelevant, unimportant, or insignificant change in one's circumstance, but, rather, just the opposite. Furthermore, this announcement effectively results in the conclusion that the custodial parent may now move with the child from Arkansas to California, Hawaii or even Alaska, and the noncustodial parent may no longer argue that such a move constitutes a material change in circumstances. While it would be unjust to find *every* relocation to be a material change in circumstance (which would thereby allow a modification of custody), it seems obvious that *some* geographic separations of certain lengths would constitute a material change in circumstances. Thus, the court should recognize that relocation might very well constitute a material change in circumstances in some instances.

This announcement is illogical because the practical effect of this announcement—that relocation can never constitute a material change in cir-

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222. See discussion *infra* Part V.C.

223. *Hollandsworth II*, 353 Ark. at 486, 109 S.W.3d at 664.

224. *Id.*, 109 S.W.3d at 664.

225. See discussion *infra* Part V.C.

226. THE AMERICAN HERITAGE DICTIONARY 521 (Beth Anderson et al. eds., Dell Publishing 4th ed. 2001).

227. WEBSTER'S NEW WORLD DICTIONARY AND THESAURUS 382 (Michael Agnes et al. eds., Macmillan 1996).

228. BLACK'S LAW DICTIONARY 991 (7th ed. 1999).

cumstances justifying a change in custody—is that the custodial parent can *always* move away with the children and the noncustodial parent is, in reality, helpless to stop the move. Even if the court denies a relocation petition, the custodial parent may still move without losing custody. This announcement effectively renders court decisions on relocation petitions toothless because it does not really matter, from a custody standpoint, if the court grants or denies a custodial parent's petition.

If a modification of custody is not a potential consequence of moving in defiance of a court's relocation determination, what then are the consequences for the custodial parent if he or she relocates in the face of a denied petition? The court has rightfully established that it would not keep him or her "prisoner" in the state. This announcement, therefore, relegates relocation petitions to a formality that is enforceable only by sanctions or fines, both of which are pale in comparison to the force a relocation petition carries with it when a modification of child-custody may be a consequence of defying a court's relocation determination.

#### D. The Societal Danger in Favoring One Parent Over Another

Creating presumptions in favor of the custodial parent generates ramifications dangerous to society. Such presumptions potentially reduce the incentives for noncustodial fathers to remain in their children's lives and, thereby, contribute to the "deadbeat dad" epidemic.<sup>229</sup>

Ninety percent of all custodial parents are mothers.<sup>230</sup> Unfortunately, sixty-six percent of single custodial mothers receive no financial support from the noncustodial father of their child.<sup>231</sup> At first glance, this statistic would suggest that the majority of noncustodial fathers are primarily "deadbeat dads" and thus deserve no leniency in family law. The existence of such an unfortunate statistic, however, can be explained in three logical steps and, furthermore, serves to illustrate the societal dangers in the favoring of the custodial mother's rights over those of the noncustodial father.<sup>232</sup>

First, the creation of the presumption in the *Hollandsworth II* decision is rationalized in part on the theory that the interests of the child are most

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229. See discussion *infra* Part V.D.

230. Marion Gindes, *The Psychological Effects of Relocation for Children of Divorce*, 15 J. AM. ACAD. MATRIMONIAL L. 119, 147 (1998).

231. Jacqueline Pons-Bunney, *Non-Custodial Fathers' Rights: State's Lack of Incentives for the Father to Remain in the Child's Life*, 19 J. JUV. L. 212, 221 (1998).

232. For the duration of this subsection, the note will refer to the custodial parent in the feminine or as mother and the noncustodial parent in the masculine or as father. These associations merely reflect the statistic discussed in *supra* note 215 and not the capabilities of divorced fathers or mothers to be custodial or noncustodial parents.



strongly linked to the interests of the custodial parent.<sup>233</sup> From this it can logically be inferred that if their interests are most strongly linked, then what is most important is the relationship between the mother and the child.<sup>234</sup> Placing the highest value on the relationship between the mother and child, therefore, devalues the relationship between the father and child.<sup>235</sup> Second, legal systems and societies that devalue the relationship between the noncustodial father and child discourage the father from remaining an essential and active part of the child's life.<sup>236</sup> Finally, this discouragement intensifies the withdrawal of fathers, thereby contributing in part to the creation of the unfortunate statistic mentioned above, which finds that sixty-six percent of single mothers receive no financial support from the father.<sup>237</sup> Theoretically, noncustodial fathers should fulfill their legal duty without any prompting by the law. The reality, however, is that as the law treats noncustodial fathers less like a parent and more like a paycheck, statistics such as those mentioned above will only worsen.<sup>238</sup>

#### E. The Neglected Psychological Perspective

Another societal danger created by favoring of the custodial parent's right to relocate lies in the psychological realm. The *Hollandsworth II* opinion gave short shrift to the psychological effect relocation has on the child, only granting such an effect a mere sentence that acknowledged just one perspective of the social science debate on the topic.<sup>239</sup> Because the court was making relocation easier for custodial parents and the children that relocate with them, the court should have considered in greater depth the psychological consequences of relocation on children.

The opposing view of the social science literature has found that the relationship between the child and the noncustodial father is of equal value and wholly apart from the relationship between the child and the custodial mother.<sup>240</sup> Mental health professionals who regularly conduct custody

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233. *Hollandsworth II*, 353 Ark. 470, 480, 109 S.W.3d 653, 660 (citing *Baures v. Lewis*, 770 A.2d 214 (N.J. 2001)).

234. See Frank G. Adams, *Child Custody and Parental Relocations: Loving Your Children from a Distance*, 33 DUQ. L. REV. 143, 150 (1994).

235. Pons-Bunney, *supra* note 231, at 220. It devalues the father and child relationship by treating that relationship as less valuable than it previously was when the parents were married, assuming that the law views the child's relationship with each parent equally when the parents are married. *Id.*

236. *Id.* at 234.

237. Gindes, *supra* note 230, at 134.

238. See discussion *supra* Part V.D.

239. *Hollandsworth II*, 353 Ark. 470, 480, 109 S.W.3d 653, 660 (citing *Baures v. Lewis*, 770 A.2d 214 (N.J. 2001)).

240. Leben & Moriarty, *supra* note 2, at 517.

evaluations have held that the relocation of the child away from the noncustodial parent damages the child's relationship with the noncustodial parent and therefore damages the child.<sup>241</sup> The greater the separation between the noncustodial parent and child, the less involved the noncustodial parent can be in the child's everyday, ordinary activities.<sup>242</sup> As the psychologist Marion Gindes points out, "being a 'vacation' parent may not be sufficient."<sup>243</sup> To fail to consider the psychological effects of relocation on children creates a societal danger, for as the American psychiatrist Karl Menninger concluded, "What's done to children; they will do to society."<sup>244</sup>

#### F. Discard the Bathwater, Keep the Baby

The Arkansas Supreme Court could have remedied *Staab's* purported inconsistency with child-custody modification law without creating a presumption in favor of the custodial parent and without going so far as to make the illogical announcement that relocation cannot constitute a material change in circumstances. The court could have simply removed the first prong of the *Staab* analysis, which required the custodial parent to meet a threshold burden of proving a "real advantage" of the move. It was this prong that the court reasoned to be inconsistent with Arkansas precedent. The court could have then left the factored analysis as a simple balancing test, free to weigh all the facts of the case without threshold burdens or custodial parent presumptions. A simple balancing test would not, in essence, set a presumption that relocation is not in the child's best interest. It would only require the courts to weigh the interests of both parties and the children and either grant or deny relocation requests on that basis.

As a practical matter, the court should balance the interests of all parties when determining if the custodial parent is entitled to relocate with the child. If the court denies relocation and the custodial parent moves with the child anyway, the court should then be allowed to consider the relocation petition decision and its findings in a child-custody modification case, if the noncustodial parent chooses to institute such a proceeding. Allowing for consideration of the relocation decision's findings in the subsequent child-custody modification proceeding gives relocation decisions some teeth and yet does not go so far as to grant those decisions the power alone to modify child custody, the power the court found to be inconsistent with Arkansas precedent.

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241. Terry, *supra* note 1, at 1016.

242. Gindes, *supra* note 230, at 135.

243. *Id.*

244. Wallerstein & Tanke, *supra* note 11, at 305.

### G. Conclusion

Relocation cases “present some of the knottiest and most disturbing problems that . . . courts are called upon to resolve.”<sup>245</sup> That fact, coupled with the fact that the *Hollandsworth II* opinion presents various problems, indicates that relocation law in Arkansas has not been quieted. As it stands right now, in accordance with the *Hollandsworth II* opinion, if the noncustodial parent objects to the relocation of the child by the custodial parent, he or she must enter court and rebut the custodial parent’s presumptive right to relocate. If the noncustodial parent is able to rebut this presumption, the court will then conduct an analysis under the framework of five factors. Even if the presumption is rebutted, however, and the five factors weigh in favor of the noncustodial parent, the custodial parent may still move without losing custody of the children because of the opinion’s announcement that relocation can never constitute a material change in circumstances.

The Arkansas Supreme Court should have removed the first prong of the *Staab* analysis and left relocation determinations as simple balancing tests without creating a presumption in favor of the custodial parent’s right to relocate. Because relocation disputes are so fact intensive, all the facts of each case should be free to contribute their appropriate weight to the balancing of the various interests of the parties. The law should not place these interests on scales already unbalanced by presumptions. The scales of justice, if they are to be truly just, should tolerate no such imperfection of measurement.

The *Hollandsworth II* decision creates problems and uncertainty for Arkansas family law practitioners and domestic relations courts and renders relocation petitions useless through the creation of illogical precedent.<sup>246</sup> Furthermore, the creation of the custodial parent’s presumptive right engenders dangerous psychological and societal consequences.<sup>247</sup> When parents get a divorce, they divorce each other, not their children. This opinion, however, deemphasizes the role played by the noncustodial parent in his or her child’s life and, as such, subtly demotes the noncustodial parent from parent to paycheck.

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245. Ford, *supra* note 145, at 5.

246. See discussion *supra* Part V.A–C.

247. See discussion *supra* Part V.D–E.

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