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## Moving Away from Certainty: Using Mediation to Avoid Unpredictable Outcomes in Relocation Disputes Involving Joint Physical Custody

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# MOVING AWAY FROM CERTAINTY: USING MEDIATION TO AVOID UNPREDICTABLE OUTCOMES IN RELOCATION DISPUTES INVOLVING JOINT PHYSICAL CUSTODY

**Abstract:** This Note describes the frameworks used by the courts of various states to modify joint physical custody plans when one parent wishes to relocate with the child to a different jurisdiction. The standards currently used by all states (variants of the “best interests of the child” standard) are too unpredictable, unfairly punish one parent with a substantial loss of parenting time, and fail to take into account alternative solutions that may be acceptable for all parties. Therefore, states should adopt a plan of mandated mediation, using litigation under the “best interests of the child” standard only when mediation utterly fails. This Note also argues for the increased use of guardians ad litem when such court decisions become necessary.

## INTRODUCTION

In *Bleak House*, Charles Dickens’s narrator remarked that any honorable practitioner in the Court of Chancery<sup>1</sup> should warn clients, “Suffer any wrong that can be done to you, rather than come here!”<sup>2</sup> Indeed, when the courts are asked to rule on relocation<sup>3</sup> cases involving child custody, the results can be harsh and unpredictable, especially when the custodial arrangement allowed both parents to play equal roles in raising their children.<sup>4</sup> We live in an increasingly mobile society

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<sup>1</sup> The several states use various terms to describe the court that hears child custody disputes, including “chancery court,” “probate court,” or “family court.” This Note refers to all such courts as “family courts” and their officers as “judges.”

<sup>2</sup> CHARLES DICKENS, *BLEAK HOUSE* 3 (Bantam Classics 2006) (1853).

<sup>3</sup> This Note uses “relocation” as a term of art referring to situations in which a custodial parent seeks to change residences with the child, thus necessitating a change in the custodial agreement. See *Sara P. v. Richard T.*, 670 N.Y.S.2d 964, 966 (Fam. Ct. 1998) (“The term ‘relocation’ has become a legal term of art for cases involving a proposed move by a custodial parent.”).

<sup>4</sup> See Gary A. Debele, *A Children’s Rights Approach to Relocation: A Meaningful Best Interests Standard*, 15 J. AM. ACAD. MATRIM. LAW. 75, 78 (1998) (“[T]he concept of ‘best interests of the child’ is an amorphous concept that has been very difficult for courts, litigants, children’s advocates, and mental health professionals to flesh out and apply.”); W. Dennis Duggan, *Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation*, 45 FAM. CT. REV. 193, 193–94 (2007) (arguing that the state of the law in child relocation cases is a “mess”

in which, by the mid-1990s, one in five adults changed residences each year.<sup>5</sup> Additionally, the realities of the current labor market require that adults be able and willing to travel long distances to secure employment.<sup>6</sup> When one divorced parent decides to move out of state or far from the other parent, a previously established joint physical custody arrangement often becomes untenable.<sup>7</sup> The party seeking to relocate must either negotiate with the other custodian to alter the custody agreement or seek a remedy from the courts.<sup>8</sup>

When adjudicating relocation cases, the family courts, in applying the “best interests of the child” standard, must balance one parent’s ability to continue a close parent-child relationship with the other parent’s ability to seek economic and emotional benefits in a new domicile, which may benefit the child as well.<sup>9</sup> This Note focuses on the tests used by family courts to decide relocation cases in which both parents

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and that judges, who merely guess at the correct solution, cannot possibly determine what is in the best interests of the child); Charles P. Kindregan, Jr., *Family Interests in Competition: Relocation and Visitation*, 36 SUFFOLK U. L. REV. 31, 60 (2002) (arguing that the status of the law on relocation is in “disarray” and that courts are unable to find a “suitable procedural format for addressing the problem”).

<sup>5</sup> *Burgess v. Burgess* (*In re* Marriage of Burgess), 913 P.2d 473, 480 (Cal. 1996); see also Linda D. Elrod, *National and International Momentum Builds for More Child Focus in Relocation Disputes*, 44 FAM. L.Q. 341, 341, 342 & n.5 (2010) (providing some more recent statistics).

<sup>6</sup> *Burgess*, 913 P.2d at 480 (noting that, after a divorce, it is usually necessary for both parents to find employment, education, and the support of family and friends, requiring them to move away from the marital location); Kindregan, *supra* note 4, at 35–36 (noting that, as more women work outside the home and seek more distant employment and educational opportunities than in the past, parental relocation disputes have become more common).

<sup>7</sup> See Kindregan, *supra* note 4, at 55 (“Common sense would suggest that a distant relocation changes the framework of the child’s relationship with both parents . . .”); Paula M. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625, 656 (1985) (stating that “the possibility of creating or sustaining [a joint custody] arrangement is destroyed when one parent” moves far from the other parent).

<sup>8</sup> See *infra* notes 128–134, 185–209 and accompanying text.

<sup>9</sup> See, e.g., SANFORD N. KATZ, *FAMILY LAW IN AMERICA* 114 (2003) (framing relocation disputes as balancing the benefits of the move with the child’s ability to remain in contact with the nonrelocating parent); cf. *Fingert v. Fingert* (*In re* Marriage of Fingert), 271 Cal. Rptr. 389, 392 (Ct. App. 1990) (stating that restricting the locations where a custodial mother can reside with her child would force her “to choose between her right to resettlement, find new employment, start a new life[,] and retain custody of her child”); Judy S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 315 (1996) (stating that “prohibiting a move by the custodial parent may force that parent to choose between custody of his or her child and opportunities that may benefit the family unit” including new jobs, marriages, and relatives’ support).

exercise joint physical custody over the child.<sup>10</sup> The family courts face additional challenges when applying the best interests of the child standard to these cases, as both parents may have spent nearly equal amounts of time caring for the child and therefore would be equally qualified to continue raising the child.<sup>11</sup>

Part I of this Note compares the variations on the best interests of the child standard that family courts of several states used to adjudicate relocation disputes.<sup>12</sup> This Part demonstrates how judges possess far more discretion when resolving joint physical custody cases than sole physical custody cases, making the outcomes of the former less predictable for litigants.<sup>13</sup> Part II explains that the family courts, when applying their broad discretion to resolve joint custody disputes, often must choose one parent to receive sole physical custody, substantially curtailing the other parent's rights to raise the child.<sup>14</sup> Alternatively, the judge may deny a parent the ability to relocate with the child, forcing that parent to choose between retaining custody of the child and enjoying the proposed benefits of relocation.<sup>15</sup> Part III presents various alternative means of dispute resolution that allow parents to avoid an absolute loss of custody through compromise, mitigating the vicissitudes and emotional trauma of adversarial litigation.<sup>16</sup>

Finally, Section IV.A argues that mediation, in which an expert helps the parents devise their own solution to the relocation issue, offers the best opportunity to resolve relocation disputes in a manner agreeable to both joint physical custodians.<sup>17</sup> Section IV.B notes that if the parents utterly fail to compromise in altering or maintaining their parenting plan, a neutral arbiter must then decide the case.<sup>18</sup> In such a situation, a family court judge, given broad discretion to act in the

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<sup>10</sup> For an explanation of the differences between joint and sole custody, see *infra* notes 33–40 and accompanying text.

<sup>11</sup> See, e.g., Duggan *supra* note 4, at 198 (explaining that the most “nettlesome” relocation cases arise when both parents are “competent caretakers,” “fully involved” in their child’s life, and are able to cooperate with relatively few conflicts). Family courts have faced additional difficulties when same-sex parents relocate to jurisdictions that may not recognize the parental rights arising from their marriages or civil unions. See generally Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1 (2004) (examining the parental rights of same-sex couples).

<sup>12</sup> See *infra* notes 20–127 and accompanying text.

<sup>13</sup> See *infra* notes 28–101 and accompanying text.

<sup>14</sup> See *infra* notes 128–184 and accompanying text.

<sup>15</sup> See *infra* notes 128–184 and accompanying text.

<sup>16</sup> See *infra* notes 185–209 and accompanying text.

<sup>17</sup> See *infra* notes 216–243 and accompanying text.

<sup>18</sup> See *infra* notes 244–249 and accompanying text.

child's best interests, should rely on the report of a guardian ad litem ("GAL") to decide with whom the child should reside.<sup>19</sup>

### I. THE BEST INTERESTS OF THE CHILD

In all relocation cases, family courts apply the best interests of the child standard to decide if the child may relocate.<sup>20</sup> The precise formulation of this standard, however, varies by jurisdiction and whether the parents exercise sole or joint physical custody.<sup>21</sup> Although courts will not allow a parent to relocate with a child if it is against the child's best interests,<sup>22</sup> courts may apply a presumption in favor of one parent<sup>23</sup> or analyze the issue using lists of factors specific to that jurisdiction and type of custody.<sup>24</sup> Generally, the formulation of this standard as applied to joint physical custody cases grants the family court judge far greater discretion than in sole custody cases, making the results less predictable for the litigants.<sup>25</sup> Section I.A compares the formulations of the best

<sup>19</sup> See *infra* notes 250–283 and accompanying text.

<sup>20</sup> See Debele, *supra* note 4, at 78 (stating the "common thread" of all relocation analyses is that the "ultimate decision must be made in the best interests of the child"); Raines, *supra* note 7, at 656 (arguing that joint custody should be the default custodial plan and that all relocation cases should be decided by the best interests of the child); Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747, 1753 (2007) (stating that the standard used to decide relocation cases is "constant across time and space," and that, since the nineteenth century, the child's best interests has been the universal standard).

<sup>21</sup> See *infra* notes 54–127 and accompanying text.

<sup>22</sup> See, e.g., *Burgess*, 913 P.2d at 481–83 (stating that the noncustodial parent may prevent the move by showing that it would be detrimental to the child's welfare); AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.17(4)(b) (2002) [hereinafter ALI PRINCIPLES] (stating that, if the move is not in the best interests of the child, custody should be transferred to the noncustodial parent to prevent the child from moving); Kindregan *supra* note 4, at 42–46 (describing courts' three different approaches to adjudicate relocation disputes and noting that, under all of these models, the child will not be permitted to relocate if it is against the child's interests).

<sup>23</sup> See, e.g., *Burgess*, 913 P.2d at 481, 482 (stating that the sole custodial parent may relocate without showing that the move is necessary, unless the noncustodial parent shows that the move will harm the child); ALI PRINCIPLES, *supra* note 22, § 2.17(4)(a) (allowing the sole custodian to relocate freely, provided that there is a good faith reason for the move and that it will not harm the child).

<sup>24</sup> See, e.g., TENN. CODE ANN. § 36-6-108(c)(1)–(11) (West 2010) (listing factors to be taken into account); *Mason v. Coleman*, 850 N.E.2d 513, 518–19 (Mass. 2006) (indicating that factors to be taken into account differ in sole and joint custody cases); *Tropea v. Tropea*, 665 N.E.2d 145, 150–51 (N.Y. 1996) (listing factors to be taken into account in all relocation cases); *Yannas v. Frondistou-Yannas*, 481 N.E.2d 1153, 1158 (Mass. 1985) (listing factors to be taken into account in sole custody cases); *Sara P.*, 670 N.Y.S.2d at 967 (adding factors to sole custody test for use in joint physical custody cases).

<sup>25</sup> See *infra* notes 54–101 and accompanying text.

interests of the child standard used to decide sole physical custody cases in California, New York, and Massachusetts, and introduces the American Law Institute's recommendations concerning the formulation used by these authorities to decide joint physical custody cases.<sup>26</sup> Section I.B explains how some jurisdictions have attempted to introduce some predictability for the litigants in joint physical custody relocation cases by applying a presumption either for or against the relocation of the child, whereas other jurisdictions have decided to place both joint custodians on equal footing in the interests of fairness to all parties.<sup>27</sup>

### A. Comparing the Predictability of Outcomes in Sole and Joint Physical Custody Relocation Cases

Many jurisdictions use a different formulation of the best interests of the child standard to decide sole custody cases than they use to decide joint physical custody cases.<sup>28</sup> In general, the courts are more permissive of relocation by a sole custodian than a joint custodian because the best interests of the child are more closely tied to the desires and fortunes of a sole legal caretaker than either one of two joint caretakers.<sup>29</sup> Accordingly, in joint physical custody cases in which both parents have played a significant role in the child's life, courts will generally not assume that a joint custodian may unilaterally relocate with the child, but rather will engage in a more rigorous inquiry into the effect of the move on the child's welfare.<sup>30</sup> Therefore, in joint physical custody

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<sup>26</sup> See *infra* notes 28–101 and accompanying text.

<sup>27</sup> See *infra* notes 102–127 and accompanying text.

<sup>28</sup> Compare *Burgess*, 913 P.2d at 481–82 (stating that a sole custodian may freely relocate with the child, provided that the noncustodial parent cannot show that a change in custody is necessary to advance the child's welfare), and *Yannas*, 481 N.E.2d at 1157–58 (giving great weight to the real advantage reaped by sole custodian's relocation), with *Mason*, 850 N.E.2d at 518–19 (stating that the advantage to the relocating parent is less compelling in joint physical custody cases), and *Brody v. Kroll*, 53 Cal. Rptr. 2d 280, 282 (Ct. App. 1996) (citing *Burgess*, 913 P.2d at 483 n.12) (stating that, in a joint physical custody case, the trial court must determine de novo which parent may decide the residence of the child).

<sup>29</sup> See *Mason*, 50 N.E.2d at 518–19 (explaining that the advantage reaped by one custodial parent is less compelling in joint physical custody cases than in sole custody cases).

<sup>30</sup> Compare *Burgess*, 913 P.2d at 481–82 (stating that the sole custodial parent may relocate without showing that the move is necessary, unless the noncustodial parent shows that the move will harm the child), and ALI PRINCIPLES, *supra* note 22, § 2.17(4)(a) (allowing the sole custodian to relocate freely, provided that there is a good faith reason for the move and it will not harm the child), with *Brody*, 53 Cal. Rptr. 2d at 282 (citing *Burgess*, 913 P.2d at 483 n.12) (stating that, in a joint physical custody case, the trial court must determine de novo which parent is to receive sole custody and the residence of the child without a presumption in favor of either parent), and ALI PRINCIPLES, *supra* note 22, § 2.17(4)(c) (stating that, when

cases, the family courts have broader discretion than in sole custody cases to allow or deny the relocation of the child.<sup>31</sup>

To decide whether to use the sole or joint physical custody formulation of the best interests of child standard, the family court must first determine what sort of custody arrangement the parents exercise.<sup>32</sup> Traditionally, most divorcing couples with children have continued their relationship with the child through sole custody in which one parent provides the vast majority of childcare and assumes sole responsibility for making important decisions in the child's life.<sup>33</sup> The noncustodial parent may see the child at specified times according to visitation rights.<sup>34</sup> By contrast, under joint custody<sup>35</sup> arrangements, the parents may share legal custody (the right to make decisions affecting the child), physical custody (the right to exercise the duties of everyday childcare), or both.<sup>36</sup> Although joint legal custody is common today, joint physical custody—in which parents divide childcare responsibilities approximately equally—remains somewhat rare<sup>37</sup> and, in most jurisdictions, joint physical custody does not imply an equal sharing of responsibility but only that the child is assured “frequent and continuing contact with both parents.”<sup>38</sup> Some divorcing parents, however, endeavor to structure their joint custody relationship to equally divide day-to-day childcare duties, perhaps transferring the child between

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parents exercise equal responsibilities for childcare, there should not be a presumption for or against relocation, but rather the case must be decided based on the best interests of the child).

<sup>31</sup> See *infra* notes 54–101 and accompanying text.

<sup>32</sup> See *supra* notes 28–30 and accompanying text.

<sup>33</sup> KATZ, *supra* note 9, at 111.

<sup>34</sup> *Id.*

<sup>35</sup> Alternatives to sole custody have been given a variety of names including “shared custody,” “divided custody,” “alternating custody,” and “shifting custody,” but “joint custody” is the term most frequently used to describe an arrangement in which parenting responsibilities are split. Lewis Kapner, *Joint Custody and Shared Parental Responsibility: An Examination of Approaches in Wisconsin and in Florida*, 66 MARQ. L. REV. 673, 673–74 (1983). To avoid confusion, this Note uses the term “joint custody” or “joint legal custody” to describe a relationship in which both parents are able to make decisions for the child. This Note uses the term “joint physical custody” to signify a custodial plan in which childcare responsibilities are divided between both parents and both households function as the child's primary residence.

<sup>36</sup> See Raines, *supra* note 7, at 626–27 (defining physical and legal custody as elements of a joint custody agreement).

<sup>37</sup> See *Mamolen v. Mamolen*, 788 A.2d 795, 801 (N.J. Super. Ct. App. Div. 2002) (citing *Pascale v. Pascale*, 660 A.2d 485, 491 (N.J. 1995)) (noting that joint custody arrangements with an unequal division of childcare responsibilities were “quite common” in 2002, whereas plans that divided responsibility for the child equally were rare).

<sup>38</sup> Raines, *supra* note 7, at 626–27 (internal quotation marks omitted).

their households on a daily or weekly basis.<sup>39</sup> Such joint physical custody plans have been lauded by scholars and judges for allowing children to develop strong attachments to both of their parents.<sup>40</sup>

The custody agreements adopted at the time of divorce, however, are not always clearly identifiable to the courts as establishing joint or sole custody.<sup>41</sup> To complicate matters, the actual responsibilities parents exercised do not always match what was agreed upon in the custody agreement or mandated in a custody order.<sup>42</sup> Accordingly, some jurisdictions place substance over form when deciding whether to analyze relocation cases as involving sole or joint custody.<sup>43</sup> These courts look to the facts of each case, applying the joint physical custody standard only when both parents in fact share custodial responsibilities equally.<sup>44</sup> If one parent spends significantly more time with the child, that parent is often treated as a sole custodian in relocation cases.<sup>45</sup> In practice,

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<sup>39</sup> See, e.g., *In re Marriage of Smith*, 665 N.E.2d 1209, 1210 (Ill. 1996) (recounting a joint physical custody plan whereby the children lived with the mother for five days in a row during the first and third weeks of the month and two and a half days during the second and fourth weeks of each month and lived with the father the remainder of each week); *Voit v. Voit*, 721 A.2d 317, 320 (N.J. Super. Ct. Ch. Div. 1998) (stating that, under the custody agreement, the child would live with the father from Thursday to Monday and with the mother for the rest of the week).

<sup>40</sup> See, e.g., Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393, 393, 402 (1998) (discussing the benefits of joint physical custody plans before and after divorce); Raines, *supra* note 7, at 639–40, 642 (discussing several studies showing that joint custody plans that provide close contact with both parents promote the child’s welfare and the parent’s feelings of involvement better than sole custody plans).

<sup>41</sup> See Kapner, *supra* note 35, at 673–74 (noting the confusing variety of terms used to describe custodial plans and how variations of sole custody may be confused for joint custody plans).

<sup>42</sup> See *Dupré v. Dupré*, 857 A.2d 242, 257 (R.I. 2004) (recognizing the possibility that the sole custodian in the court’s decree may not be the child’s actual primary caretaker, and joint custodians may not actually be splitting responsibilities equally); *Mamolen*, 788 A.2d at 798 (stating that labels used in custody arrangements are not “conclusive proof of the relationship’s inherent nature”); Wallerstein & Tanke, *supra* note 9, at 317 (noting that custodial plans can change over time and that one parent may become a de facto sole custodian of the child despite a de jure agreement providing for joint physical custody).

<sup>43</sup> See, e.g., *Mamolen*, 788 A.2d at 798 (“Our family courts are courts of equity and are bound not by the form of agreements, only substance.” (citing *Applestein v. United Bd. & Carton Corp.*, 159 A.2d 146, 154 (N.J. Super. Ct. Ch. Div. 1960))).

<sup>44</sup> See *infra* notes 47–53 and accompanying text. *But see* *Jaramillo v. Jaramillo*, 823 P.2d 299, 304, 309 (N.M. 1991) (deciding that, under a joint custody decree, parents have equal decision-making power and therefore stand on equal footing in relocation cases, even if one parent assumes a majority of everyday care).

<sup>45</sup> See, e.g., *Altomare v. Altomare*, 933 N.E.2d 170, 176 (Mass. App. Ct. 2010) (stating that the standard for sole custody cases should be used whenever one parent *exercises* a clear majority of custodial responsibility); ALI PRINCIPLES, *supra* note 22, § 2.17(4)(a)–(c)



family courts have found such temporal distinctions difficult to make, and commentators have noted that this method may lead to arbitrary classifications in close cases.<sup>46</sup>

In 2002, in *Mamolen v. Mamolen*, the New Jersey Superior Court, Appellate Division, remarked that equity courts are obligated to look to the true nature of the relationship, regardless of the labels used by the parties to describe it.<sup>47</sup> In *Mamolen*, the court found that, although the parties used the “de rigeur” label of joint custody, in reality, only about twenty-nine percent of the parenting time was allocated to the father; therefore it did not exercise a “joint custody relationship.”<sup>48</sup> Likewise, in 2004, the Supreme Court of Rhode Island noted in *Dupré v. Dupré* that custodial labels may not reflect reality, and that the trial judge must use discretion to determine if either parent exercises a majority of parental duties and responsibilities, taking into account both the time spent with the child and the quality of the relationship.<sup>49</sup>

Similarly, the Massachusetts Court of Appeals explained in the 2010 case *Altomare v. Altomare* that the standard used for sole custody cases should be used whenever one parent exercises a clear majority of responsibility.<sup>50</sup> By implication, the test used in joint custody relocation cases would be used when the parents divide physical custody approximately equally.<sup>51</sup> Regardless of the labels used to describe the arrangement in the custody order, Massachusetts judges must engage in a factual inquiry to determine the true nature of the parents’ relationships with the child.<sup>52</sup> Like the court in *Altomare*, the California Court of Appeal, in the 1997 case *Whealon v. Whealon (In re Marriage of Whealon)*, distinguished between true joint physical custody, which would require

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(providing a different analytical framework for cases in which one parent “exercis[es] the clear majority of custodial responsibility” and cases in which responsibilities are divided approximately equally (emphasis added)).

<sup>46</sup> See, e.g., Erinn R. Wegner, Comment, *Should the Standards in “Move-Away” Cases Be Different for Sole and Joint Physical Custody?*, 16 J. CONTEMP. LEGAL ISSUES 261, 266 (2007) (arguing that any strict temporal distinction between sole and joint custody would be arbitrary and unrelated to the strength of the parent-child relationship and criticizing the California courts for determining that a father who spent four days per week with his children was a joint physical custodian, whereas a father who spent three days per week with his children was not).

<sup>47</sup> 788 A.2d at 798.

<sup>48</sup> *Id.* at 798–99.

<sup>49</sup> 857 A.2d at 257.

<sup>50</sup> 933 N.E.2d at 176.

<sup>51</sup> See *id.* (defining joint physical custody but applying the sole custody standard because parenting time was not divided equally).

<sup>52</sup> See *id.* (rejecting the joint custody label in this case based on an assessment of the parenting agreement’s substance and actual implementation).

frequent contact with the child approximately four or five days per week, and sole custody with liberal visitation rights, in which the father would care for the child one night per week and every other weekend.<sup>53</sup>

The American Law Institute (ALI) has promulgated a set of “principles” to guide courts and legislatures in finding solutions to relocation disputes.<sup>54</sup> Like the jurisdictions previously discussed,<sup>55</sup> this proposal eschews formal labels for types of custody and instead differentiates between cases in which the relocating parent *exercises* a “clear majority” of responsibility for the child and cases in which the parents share responsibilities approximately equally.<sup>56</sup> If one parent exercises a clear majority of custodial responsibility, the ALI recommends that the court allow this parent to relocate with the child, provided that the move “is for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose.”<sup>57</sup> If that parent does not show that the move is in good faith or made for a valid purpose, the court may modify the custody order, granting primary custody to the nonrelocating parent.<sup>58</sup> The court, according to the ALI, should not allow a parent who has exercised less custodial responsibility than the other to relocate with the child, unless this plan is necessary to avoid harm to the child.<sup>59</sup>

If, however, both parents exercise approximately equal amounts of custodial responsibility, the ALI Principles recommend that courts be given wide discretion to modify the custodial plan to advance the best interests of the child.<sup>60</sup> Unlike in sole custody cases, the court is not required to allow a move for any good-faith reason, but rather must “take[] into account all relevant factors” including the burdens and benefits to the child in the event of relocation.<sup>61</sup> These factors include the quality of the child’s relationship with each parent, each parent’s ability to care for the child, the preferences of the child, the ability of the parents to work together, the child’s interest in living with siblings,

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<sup>53</sup> 61 Cal. Rptr. 2d 559, 561, 562 (Ct. App. 1997) (citing *Brody*, 53 Cal. Rptr. 2d at 282).

<sup>54</sup> See Lance Liebman, *Director’s Foreword* to ALI PRINCIPLES, *supra* note 22, at XIII (indicating that the work was intended to provide guidance to legislatures and courts on the law of family dissolution, including divorce and child custody).

<sup>55</sup> See *infra* notes 43–53 and accompanying text.

<sup>56</sup> ALI PRINCIPLES, *supra* note 22, § 2.17(4).

<sup>57</sup> *Id.* § 2.17(4)(a).

<sup>58</sup> *Id.* § 2.17(4)(b).

<sup>59</sup> *Id.* § 2.17(4)(d).

<sup>60</sup> See *id.* § 2.17(4)(c) (instructing judges to “take[] into account all relevant factors” to modify the custodial plan in accordance with the best interests of the child).

<sup>61</sup> *Id.*

and the practical difficulties of scheduling and transporting the child between residences.<sup>62</sup>

Like the ALI Principles, the California courts afford a sole custodian wide latitude to relocate with the child.<sup>63</sup> A sole custodian in California may relocate with the child unless the noncustodial parent successfully petitions the court to become a sole or joint custodian by showing that the move is against the child's best interests.<sup>64</sup> The Supreme Court of California, in the 1996 case *Burgess v. Burgess (In re Marriage of Burgess)*, ruled that, although the sole custodian need not show that the move is necessary for the child's wellbeing, a noncustodial parent wishing to prevent the move must show that a change in custody to favor the nonrelocating parent is "essential or expedient" to promote the child's interests.<sup>65</sup> Although the California courts look to all relevant factors to determine which parent's residence would better promote the child's welfare, the primary basis of the court's decision in sole custody cases will often be the continuity of the child's relationship with its primary caretaker.<sup>66</sup> The decision in *Burgess* was implicitly intended to provide greater predictability in relocation cases, allowing custodial parents greater freedom to relocate in an increasingly mobile society.<sup>67</sup>

Such predictability is absent from the California courts' method of resolving relocation cases involving joint physical custody.<sup>68</sup> In a footnote to the decision in *Burgess*, the court stated that the statutory pre-

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<sup>62</sup> ALI PRINCIPLES, *supra* note 22, § 2.08(1).

<sup>63</sup> See *Burgess*, 913 P.2d at 480 (quoting *In re Marriage of Ciganovich*, 132 Cal. Rptr. 261, 263 (Ct. App. 1976)) ("It has long been established that . . . the 'general rule [is that] a parent having child custody is entitled to change residence unless the move is detrimental to the child.'"); ALI PRINCIPLES, *supra* note 22, § 2.17(4)(a) (allowing the parent with a clear majority of responsibility to relocate the child for any broadly-defined "valid purpose").

<sup>64</sup> See CAL. FAM. CODE § 7501(a) (West 2004); *Burgess*, 913 P.2d at 476, 482 (holding that, in custody determinations in which one party seeks to relocate, the custodial parent need not show the move is necessary, but may relocate unless the relocation violates the best interests of the child).

<sup>65</sup> 913 P.2d at 481–82.

<sup>66</sup> *Id.* at 482–83.

<sup>67</sup> See *id.* at 480–81 (noting that one in five Americans changed residences every year, that such moves were necessary for securing employment or education, and that placing the burden of proof on the relocating parent to show that the move was necessary would undermine the public policy of preventing costly litigation about everyday decisions).

<sup>68</sup> See *id.* at 483 n.12 (stating that instead of using the general rule favoring the custodial parent, the court should instead decide *de novo* what custody arrangement promotes the child's best interests); *Brody*, 53 Cal. Rptr. 2d at 282 (stating, in a joint physical custody relocation case, that the trial court should have determined *de novo* what custody arrangement would be best for the child (citing *Burgess*, 913 P.2d at 483 n.12)).

sumption that the custodial parent may relocate with the children will not apply in cases in which both parents share physical custody of the children.<sup>69</sup> Instead the courts must determine de novo what arrangement for primary custody is in the children's best interests.<sup>70</sup> A few months after the 1996 decision in *Burgess*, the California Court of Appeals followed the directives of this footnote in *Brody v. Kroll*.<sup>71</sup> In that case, the parents exercised joint physical custody, spending approximately equal amounts of time with their child.<sup>72</sup> When the mother sought to move from California to Connecticut, the father petitioned the court for modification of the custody order.<sup>73</sup> Following the footnote in *Burgess*, the court was unable affirm the child's relocation, and remanded the case, instructing the trial court to review the custody order de novo.<sup>74</sup>

Unlike California and the ALI, the Court of Appeals of New York, in the 1996 case *Tropea v. Tropea*, rejected an approach that would tip the scales of justice in favor of a sole custodian's ability to relocate the child.<sup>75</sup> In New York, all relocation cases are governed by the more flexible and discretionary test articulated in *Tropea*, which requires the courts to determine, by a preponderance of the evidence, which primary residence would better promote the child's welfare.<sup>76</sup> The relocating parent—either a sole or joint custodian—bears the burden of proof to show that the move would be in the best interests of the child.<sup>77</sup> The *Tropea* court listed several potential factors family courts should balance when making this decision.<sup>78</sup> These factors included: the strength of the child's relationship with each parent; the effect of the move on the

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<sup>69</sup> 913 P.2d at 483 n.12.

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

<sup>71</sup> See *Brody*, 53 Cal. Rptr. 2d at 282 (citing *Burgess*, 913 P.2d at 483 n.12) (stating that, because the parents shared custodial responsibilities equally, the court should have determined the issue of custody de novo, assessing the best interests of the child without using a presumption in favor of either parent).

<sup>72</sup> *Id.* at 281, 282.

<sup>73</sup> *Id.* at 281.

<sup>74</sup> *Id.* at 282 (citing *Burgess*, 913 P.2d at 483 n.12).

<sup>75</sup> 665 N.E.2d at 151; see also *Burgess*, 913 P.2d at 480 ("It has long been established that . . . the 'general rule [is that] a parent having child custody is entitled to change residence unless the move is detrimental to the child.'" (quoting *Ciganovich*, 132 Cal. Rptr. at 263)); ALI PRINCIPLES, *supra* note 22, § 2.17(4)(a) (allowing the parent with a clear majority of responsibility to relocate the child for any broadly-defined "valid purpose").

<sup>76</sup> See 665 N.E.2d at 150–52 (holding that, in all relocation cases, the courts should apply the best interests of the child analysis by considering several listed factors).

<sup>77</sup> See *Murphy v. Peace*, 899 N.Y.S.2d 493, 494 (App. Div. 2010) (mem.) (citing *Tropea*, 665 N.E.2d at 151–52).

<sup>78</sup> 665 N.E.2d at 151.

child's relationship with the noncustodial parent; the feasibility of maintaining the relationship with the noncustodial parent; the custodial parent's reasons for seeking the move; and the economic, educational, and emotional benefits to the child of moving to the new location.<sup>79</sup> The court in *Tropea* allowed the family court judges to exercise their discretion when determining the weight to give each factor in each case.<sup>80</sup>

In 1998, a New York Family Court, in *Sara P. v. Richard T.*, attempted to use this standard to decide a case in which the parents divided custodial responsibility equally.<sup>81</sup> Noting that this situation is rare,<sup>82</sup> the court decided that the factors listed in *Tropea* provided little guidance.<sup>83</sup> Although the family court applied a *Tropea*-like analysis, weighing various factors to determine if relocation would be in the child's best interests, the court decided to include additional factors not listed in *Tropea*.<sup>84</sup> The court found that the most important factors in this particular case, though not listed in *Tropea*, were the continued existence of a long-standing joint custody plan, the child's success in the local school district, and the parent who is better able to respond to the child's needs.<sup>85</sup> If, indeed, the *Tropea* factors can be so easily altered by the family courts, New Yorkers are left with little assurance that the outcome of their relocation case will be based on any predictable standard, especially if they exercise joint physical custody.<sup>86</sup>

Like the New York courts, the Massachusetts Supreme Judicial Court decided that relocation cases must be decided on a case-by-case basis, without automatically favoring one parent over the other.<sup>87</sup> In 1985, the Supreme Judicial Court articulated, in *Yannas v. Frondistou-Yannas*, that its standard for sole custody relocation cases should be go-

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> 670 N.Y.S.2d at 964, 966.

<sup>82</sup> *See id.* at 966 (noting that the court was unable to find any reported relocation case in which the parents were truly equal caretakers of the child).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 967.

<sup>85</sup> *Id.* at 966–67.

<sup>86</sup> *See id.* at 967 (noting that the most compelling factors leading to the decision in this case were not included in the higher court's list of factors to be taken into account).

<sup>87</sup> *See Tropea*, 665 N.E.2d at 151 (refusing to “view relocation cases through the prisms of presumptions and threshold tests that artificially skew the analysis in favor of one outcome or another”); *Yannas*, 481 N.E.2d at 1158 (refusing to impose heightened burdens of proof or “identify[] constitutional rights in favor of one person against another” when assessing the interests of each person in the case).

verned by the best interests of the child.<sup>88</sup> The *Yannas* court also required the relocating parent to show that the move is grounded in a good reason, or “real advantage” to the relocating parent and children.<sup>89</sup> Although this requirement places a greater burden on the relocating parent, this burden is relatively easy to meet, as an advantage to the parent is usually considered to be related to the child’s welfare.<sup>90</sup> Indeed, in *Yannas*, the Supreme Judicial Court affirmed the lower court’s finding of a real advantage to the children because relocation to Greece would benefit the mother “financially, emotionally, and socially” and the children would also benefit from her improved situation.<sup>91</sup>

Once the relocating parent shows that a real advantage will accrue to the children, the family courts consider a variety of factors—none of which are controlling—to determine if the move is in the best interests of the child.<sup>92</sup> These factors include the effects on the child’s “emotional, physical, and developmental needs;” the adverse effects of limiting the child’s association with the noncustodial parent; the benefits to the child and custodial parent resulting from the move; the “soundness of the reason for moving;” the extent to which the noncustodial parent will be deprived of parenting time; the fitness of the noncustodial parent to exercise parenting rights; and the existence of a motive to deprive the noncustodial parent of parental rights.<sup>93</sup> When addressing these factors, the family courts must weigh the interests of both parents as well as those of the child, but the child’s interests, including the real advantage from the move, are always given the greatest weight.<sup>94</sup> Giving such great weight to the real advantage of the move—which may be only tangentially related to the child’s welfare—Massachusetts courts

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<sup>88</sup> See 481 N.E.2d at 1158 (requiring the relocating parent to show that the move will provide a “real advantage” and then that the move is in the child’s best interests).

<sup>89</sup> *Id.*

<sup>90</sup> See *id.* (stating that a real advantage may be established by showing “a good, sincere reason for wanting to remove to another jurisdiction”). Subsequent cases have found a real advantage when the custodial parent and child expect to reap emotional or financial benefits from the move. See, e.g., *Altomare*, 933 N.E.2d at 176–77 (finding a real advantage in moving to a new town to avoid painful encounters with an adulteress); *Abbott v. Virusso*, 862 N.E.2d 52, 56–57 (Mass. App. Ct. 2007) (finding a real advantage when the mother would benefit financially and socially by moving to Arizona to be with her fiancé); *Wakefield v. Hegarty*, 857 N.E.2d 32, 37 (Mass. App. Ct. 2006) (finding a real advantage when the mother’s relocation would result in increased salary and greater proximity to her relatives).

<sup>91</sup> 481 N.E.2d at 1158.

<sup>92</sup> *Id.*

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

<sup>94</sup> *Id.*

have often found that relocating with a sole custodian was in the child's best interests.<sup>95</sup>

In 2006, the Massachusetts Supreme Judicial Court, in *Mason v. Coleman*, articulated a different standard to be used in joint custody cases.<sup>96</sup> The court noted that when both parents divide childcare responsibilities equally there is less connection between the child's best interests and the advantage to any one parent resulting from the move.<sup>97</sup> Accordingly, the court held that in cases in which neither parent exercises a clear majority of custodial responsibility, the court should deemphasize the benefits reaped by the relocating parent and instead focus solely on the best interests of the child.<sup>98</sup> Although this approach would seem to eliminate what predictability the real advantage standard offered, the *Mason* court noted that, in joint physical custody cases, the court should attempt to maintain the status quo and deny any move that will impair the relationship between the child and the nonrelocating parent.<sup>99</sup> The predictability of this standard, however, is undermined by the fact that the Massachusetts courts have no bright-line tests to determine whether parents exercise sole or joint physical custody<sup>100</sup> or whether a move will disrupt the current custodial plan.<sup>101</sup>

### B. Distributing Burden of Proof in Joint Physical Custody Relocation Cases

Although joint physical custody relocation cases are decided by the best interests of the child standard,<sup>102</sup> some jurisdictions apply pre-

<sup>95</sup> *Id.* at 1157–58 (stating that, although the child's interests are "paramount," they are closely tied to the advantages reaped by a custodial parent from the relocation (quoting *Cooper v. Cooper*, 491 A.2d 606, 612 (N.J. 1984))); *see also Allomare*, 933 N.E.2d at 176–77; *Abbott*, 862 N.E.2d at 56–57; *Wakefield*, 857 N.E.2d at 37.

<sup>96</sup> 850 N.E.2d at 518–19.

<sup>97</sup> *Id.* at 519.

<sup>98</sup> *Id.* at 515, 518–19.

<sup>99</sup> *See id.* at 519, 520 (stating that the child's welfare is best served by maintaining existing contact with both parents and indicating that the trial judge is to take into account any increases in travel time that may impair either parent's ability to exercise existing responsibilities when assessing the best interests of the child).

<sup>100</sup> *See supra* notes 51–52 and accompanying text.

<sup>101</sup> *See infra* notes 152–154 and accompanying text.

<sup>102</sup> *See, e.g., Smith*, 665 N.E.2d at 1213 (stating that, in an Illinois joint custody case, "the paramount question in a removal case is whether the move is in the best interests of the children" (citing *In re Marriage of Eckert*, 518 N.E.2d 1041, 1044 (Ill. 1988))); *Jaramillo*, 823 P.2d at 303 (describing the best interests of the child standard as the "lodestar" for determining custody modifications); *Chen v. Heller*, 759 A.2d 873, 884 (N.J. Super. Ct. App. Div. 2000) (stating that, in a New Jersey joint custody case, the standard for modification of custody is the best interests of the child); *Watson v. Watson*, 196 S.W.3d 695, 700

sumptions or burdens of proof that favor the nonrelocating parent.<sup>103</sup> Other jurisdictions place joint physical custodians on equal footing in relocation cases.<sup>104</sup> The outcome of a joint custody relocation case will often depend on who bears the burden of proof, as the parents are otherwise equally situated, each having proven that they can adequately raise the child.<sup>105</sup> Placing the burden of proof on the relocating party would thus make the outcome of the case more predictable, but, in the eyes of some courts and commentators, would be unfair to the relocating party.<sup>106</sup>

In Illinois, for instance, a relocating joint custodian is at a disadvantage, as that parent must show that the child's relationship with the other parent will not suffer as a result of even a long-distance move.<sup>107</sup> In that state, all relocation cases are governed by the standard articulated by the Supreme Court of Illinois in the 1988 sole custody relocation case of *In re Marriage of Eckert*.<sup>108</sup> Under the *Eckert* standard, relocation cases are decided by the best interests of the child.<sup>109</sup> To reach that conclusion, courts look at four factors: the likelihood that the proposed move

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(Tenn. Ct. App. 2005) (stating that relocation cases must be decided based on the best interests of the child (citing Tenn. Code Ann. § 36-6-108(c) (West 2001))).

<sup>103</sup> See, e.g., *Smith*, 665 N.E.2d at 1213 (“The party seeking removal has the burden of proving it is in the children’s best interests.” (citing *Eckert*, 518 N.E.2d at 1044)); *Connelly v. Connelly*, 644 So. 2d 789, 793 (La. Ct. App. 1994) (noting that the party seeking to modify a custody order must show that a material change in circumstances has arisen since the previous order and that a modification is in the child’s best interests).

<sup>104</sup> See TENN. CODE ANN. § 36-6-108(c) (West 2010) (stating that the courts shall not apply a presumption in favor of either parent if they “are actually spending substantially equal intervals of time with the child”); *Jaramillo*, 823 P.2d at 309 (refusing to impose a presumption for or against either parent and requiring both to show what arrangement would be in the child’s best interests without placing the burden of proof on only one parent).

<sup>105</sup> See *Mamolen*, 788 A.2d at 797 (“Experience informs that the ultimate outcome of [relocation cases] often turns on the placing of the burden of persuasion.”); *Kindregan*, *supra* note 4, at 45 (suggesting that, though the best interests of the child test seems neutral, the test may be weighted in favor of one party by imposing a greater evidentiary burden on the relocating party).

<sup>106</sup> See, e.g., *Jaramillo*, 823 P.2d at 303, 304, 309 (holding that neither party deserves the benefit of a presumption when both have equal custodial responsibilities); *Mamolen*, 788 A.2d at 797 (noting that the burden of proof in relocation cases often dictates the outcome); *Debele*, *supra* note 4, at 76–77 (noting that a presumption in favor of one party ignores the interests of the other party).

<sup>107</sup> See *Smith*, 665 N.E.2d at 1214 (denying children’s relocation to New Jersey in part because it would make weekend visits with the father in Illinois “extremely difficult”).

<sup>108</sup> 518 N.E.2d at 1045–46 (listing factors to determine the best interests of a child in a sole custody case); see *Smith*, 665 N.E.2d at 1213–14 (using *Eckert* standard in a joint custody case).

<sup>109</sup> 518 N.E.2d at 1044.



will enhance the child and parent's quality of life, the motives of the parent seeking the move, the motives of the parent resisting the move, and whether a reasonable visitation schedule can be reached after the move.<sup>110</sup> The court in *Eckert* placed great weight on the rights of the nonrelocating parent, noting that a child's best interests would be served by continuing its relationship with both parents.<sup>111</sup> In a 1996 joint physical custody case, *In re Marriage of Smith*, the Illinois Supreme Court, applying the *Eckert* factors, affirmed the order of the trial court that found that the mother, as relocating parent, failed to satisfy her burden of proof to show that the move would be beneficial to the child and that the father's parenting time would not be affected.<sup>112</sup> The trial court mentioned that the distances between the two states would make usual weekend visits impossible,<sup>113</sup> implying that it would be nearly impossible to satisfy the fourth *Eckert* factor in cases involving long-distance moves.<sup>114</sup>

Similarly, in New Jersey, when parents share a joint physical custodial relationship to a child, the courts, treating the case as a petition for change of custody,<sup>115</sup> look to the best interests of the child.<sup>116</sup> As in Illinois, the formulation of this standard disadvantages the relocating parent, who must bear the burden of proof to show that there has been a change in circumstances and that the interests of the child are better served by a change in the custodial arrangement.<sup>117</sup> Once the relocat-

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<sup>110</sup> *Id.* at 1045–46.

<sup>111</sup> *Id.* at 1045.

<sup>112</sup> 665 N.E.2d at 1213, 1214–15.

<sup>113</sup> *Id.* at 1214.

<sup>114</sup> *See id.* (affirming the trial court's finding that removal to a distant jurisdiction would impair weekend visits and therefore substantially impair the relationship between the children and the nonrelocating parent).

<sup>115</sup> *Baures v. Lewis*, 770 A.2d 214, 229 (N.J. 2001); *see Mamolen*, 788 A.2d at 796 (stating that, if the parties have a true shared custodial relationship, the court must modify the custodial arrangement to allow the child to be removed from the jurisdiction); *Chen*, 759 A.2d at 884 (treating a relocation case primarily as a modification of joint custody); *Voit*, 721 A.2d at 326 (same).

<sup>116</sup> *Baures*, 770 A.2d at 229.

<sup>117</sup> *See Voit*, 721 A.2d at 326, 327 (finding that the relocating father had not met his burden to show that the child's interests would be better served by moving with him instead of staying with the mother, despite noting that the relocating parent is "saddled" with the burden of proof and finding both parents equally qualified to care for their child); *see also Smith*, 665 N.E.2d at 1213, 1214 (noting that, in Illinois, the party seeking removal bears the burden of proof and finding that the relocating mother was unable to show that the father's relationship with the children would not be impaired); *Chen*, 759 A.2d at 884, 886 (allowing children to move to Texas with their mother because she met her burden of proof by submitting the testimony of two experts stating that such a move would be in the children's best interests and that the children preferred to live with their mother).

ing parent shows such a change in circumstances, the New Jersey courts do not compare the status quo of joint custody with the potential for one parent to exercise sole custody, as that would make the burden impossible to meet.<sup>118</sup> Instead, the court must treat the move as inevitable and choose one parent or the other as primary custodian.<sup>119</sup> Finding that a relocating father failed meet his burden of proof to show a change in circumstances, the New Jersey Superior Court, in the 1998 case of *Voit v. Voit*, simply refused to modify the joint custody agreement, noting that, if the father decided to move, the mother would receive sole custody.<sup>120</sup>

Other states spread the burden of proof equally, making the outcome of the case far less predictable.<sup>121</sup> In New Mexico, for instance, the courts also resolve joint custody relocation disputes by the best interests of the child standard, but the parents stand on equal footing—without a presumption in favor of one or the other—both bearing the same burden of persuading the court to rule in their favor.<sup>122</sup> Similarly, in the 2005 case *Watson v. Watson*, the Tennessee Court of Appeals ruled that relocation cases must be resolved through the inquiry outlined in the Tennessee relocation statute<sup>123</sup> that provides that no presumption for or against either parent will be used when they spend approximately equal time raising the child.<sup>124</sup> Thus both parents are situated equally, and the court is not allowed to impose a burden of proof that would give either party the benefit of the doubt.<sup>125</sup> The statute then outlines eleven factors that the courts are to consider to assess the best interests of child, including the child's preference, the emotional bonds between the parent and child, the need for stability in the child's life, and which parent is better situated to care for the child.<sup>126</sup> Because both parties requested to be the primary custodian and it was impossible to continue the joint custody relationship, the appeals court in *Watson*, based on the above factors, affirmed the lower court's decision; it allowed the child's reloca-

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<sup>118</sup> *Voit*, 721 A.2d at 327.

<sup>119</sup> *Id.* at 327, 329.

<sup>120</sup> *Id.* at 329.

<sup>121</sup> See, e.g., TENN. CODE ANN. § 36-6-108(c) (West 2010) (“No presumption in favor of or against the request to relocate with the child shall arise.”); *Jaramillo*, 823 P.2d at 309 (ruling that both parties bear an equal burden to show that their proposed parenting plan is in the child's best interests and no presumption for or against relocation is to be used).

<sup>122</sup> *Jaramillo*, 823 P.2d at 303, 304, 309.

<sup>123</sup> 196 S.W.3d at 700.

<sup>124</sup> TENN. CODE ANN. § 36-6-108(c).

<sup>125</sup> See *id.* (stating that no presumption will be applied to favor either parent).

<sup>126</sup> *Id.* § 36-6-108(c)(1)–(11).

tion, granting primary custody to the mother during the school year and allowing the child to reside with the nonrelocating father during the summer.<sup>127</sup>

## II. ALTERING JOINT-CUSTODIAL PLANS THROUGH LITIGATION

When applying the best interests of the child standard to decide a joint physical custody relocation case, family court judges often must choose between two imperfect solutions: alter the custodial plan to grant sole custody to one parent or deny a parent permission to relocate with the child.<sup>128</sup> As noted above, it is easier for sole custodians—or primary physical custodians<sup>129</sup>—to relocate with their children or prevent a noncustodial parent from relocating with the children than for joint physical custodians.<sup>130</sup> Therefore, joint physical custodians will often ask to be declared sole custodians when litigating relocation cases.<sup>131</sup> Believing that two parents are better than one and that children benefit from familial stability, the family courts, to the extent possible, try to retain the status quo by continuing the joint physical custody arrangement.<sup>132</sup> When this is impossible due to the distance of the move, the courts are often forced to choose one parent to be a sole or primary physical custodian, thereby reducing the rights and access to the

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<sup>127</sup> 196 S.W.3d at 702–03.

<sup>128</sup> See, e.g., *Mason v. Coleman*, 850 N.E.2d 513, 516 (Mass. 2006) (stating that the joint-custodial father petitioned the court to receive sole physical custody and an injunction forbidding the mother to move with the children, whereas the mother also petitioned for sole custody and the court's permission to relocate); *In re Marriage of Smith*, 665 N.E.2d 1209, 1210 (Ill. 1996) (explaining that the mother petitioned the court for sole custody as well as permission to relocate and that the father also sought sole custody of the children).

<sup>129</sup> As noted previously, some joint-custodial plans allow both parents to make decisions affecting the child, but allow only one parent to be the child's primary caretaker; the parent that spends the majority of time raising the child is sometimes referred to as a "primary physical custodian" under a joint custody plan. See *supra* notes 35–38 and accompanying text.

<sup>130</sup> See *supra* notes 28–101 and accompanying text.

<sup>131</sup> See, e.g., *Mason*, 850 N.E.2d at 516 (stating that both joint custodians sought sole custody to allow or prevent the child's relocation); *Smith*, 665 N.E.2d at 1210 (explaining that each joint custodian sought sole custody to allow or prevent the mother's move).

<sup>132</sup> See *Raines*, *supra* note 7, at 656 (arguing that relocation should rarely be allowed under joint custody plans as the child is negatively impacted by the stress of moving away from friends and family); *Wallerstein & Tanke*, *supra* note 9, at 311–12 (noting that judges often operate under an irrefutable presumption that a child's access to both parents is in the child's best interests, but arguing that the benefits of this arrangement depend on the quality and depth of the relationship with each parent); see also *Voit v. Voit*, 721 A.2d 317, 327, 329 (N.J. Super. Ct. Ch. Div. 1998) (finding that the continuation of the relationship with both joint physical custodians would be in the best interests of the child, and therefore refusing to alter the custody order).

child of the other parent.<sup>133</sup> Some commentators have noted that this drastic change in family situation creates stress for both the parent, who is deprived of custody by the courts, and the child, who loses frequent contact with one parent.<sup>134</sup>

Section II.A demonstrates the variety of ways that jurisdictions have attempted to define the distance at which a joint physical custody plan is no longer viable and the courts must intervene, granting one parent sole physical custody or permission to relocate with the child.<sup>135</sup> Section II.B discusses several joint physical custody relocation cases that demonstrate how judges have decided to deprive one parent of custodial rights in an effort to approve or deny the relocation.<sup>136</sup>

#### A. Distances That Necessitate a Change in Custody

Although some relocation cases arise when one parent seeks to move across the country,<sup>137</sup> or even to another country,<sup>138</sup> other cases arise from relatively short-distance moves within a state or to a neighboring jurisdiction.<sup>139</sup> When a parent seeks to move only a short distance away, family courts will try to maintain the current type of custody, if possible.<sup>140</sup> When the parent seeks to move so far away that the

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<sup>133</sup> See PHILIP M. STAHL, COMPLEX ISSUES IN CHILD CUSTODY EVALUATIONS 84 (1999) (“The sad reality in most relocation cases is that one parent does gain, one parent does lose, and the child almost always suffers, no matter the outcome.”); Duggan, *supra* note 4, at 194 (explaining how the process and language of litigation inspires parents to engage in an all-or-nothing battle for sole custody).

<sup>134</sup> See Duggan, *supra* note 4, at 196–97 (explaining that litigation creates deep-rooted feelings of animosity between the parents who compete for custody, causing psychological harm to the child); Raines, *supra* note 7, at 649, 651, 654 (citing several studies showing that children benefit from continued relationships with both parents and that children are negatively impacted by the stress of moving away from a stable home and the reduction of time spent with one parent).

<sup>135</sup> See *infra* notes 137–158 and accompanying text.

<sup>136</sup> See *infra* notes 159–184 and accompanying text.

<sup>137</sup> See, e.g., *Voit*, 721 A.2d at 319 (describing the father’s move from New Jersey to Arizona).

<sup>138</sup> See, e.g., *Yannas v. Frondistou-Yannas*, 481 N.E.2d 1153, 1155 (Mass. 1985) (describing the mother’s move to Greece).

<sup>139</sup> See, e.g., *Mason*, 850 N.E.2d at 515–16 (assessing the mother’s move from Massachusetts to New Hampshire); *Burgess v. Burgess (In re Marriage of Burgess)*, 913 P.2d 473, 476 (Cal. 1996) (assessing the mother’s move within California, about forty miles away).

<sup>140</sup> See, e.g., *Tropea v. Tropea*, 665 N.E.2d 145, 146, 152 (N.Y. 1996) (maintaining the sole physical custody plan because the planned move would still allow for frequent and continued visitation).

current custodial plan becomes untenable, the court must decide how it will alter the custodial plan to account for the distance.<sup>141</sup>

Some jurisdictions use a bright-line test to determine when the courts must intervene in relocation cases, relying on statutes that specify a minimum distance beyond which either the other parent or a family court must approve of the child's relocation.<sup>142</sup> In Florida, for instance, "relocation" is defined as a move by a parent of at least fifty miles from a previous residence.<sup>143</sup> In Arizona, if both parents are entitled to custody or parenting time, the relocating parent must provide notice to the other parent for any relocation outside of the state or more than one hundred miles within the state.<sup>144</sup>

Other jurisdictions use a more flexible standard, finding a change to the custodial plan necessary only when it will be disrupted by the move.<sup>145</sup> This eminently pliable standard is generally decided at the discretion of the trial judge, producing unpredictable results that some commentators find absurd.<sup>146</sup> For instance, in 1996, in *Tropea v. Tropea*, the New York Court of Appeals held that a mother who had sole custody of her children could move to Schenectady, New York, a two-and-a-half-hour journey from the home of their noncustodial father in Syracuse, New York.<sup>147</sup> Although this distance would make midweek visits impossible, the court ruled that the sole custody plan could remain intact, as this distance still allowed for "frequent and extended visitation."<sup>148</sup> Similarly, in 1996, the Supreme Court of California, in *Burgess v. Burgess (In re Marriage of Burgess)*, allowed the mother, as primary cus-

<sup>141</sup> See, e.g., *Chen v. Heller*, 759 A.2d 873, 885–86 (N.J. Super. Ct. App. Div. 2000) (noting that the mother's move from New Jersey to Texas necessitated a change in the custodial plan and granting the mother primary physical custody of the children).

<sup>142</sup> E.g., ARIZ. REV. STAT. ANN. § 25-408(B) (2007 & Supp. 2010) (West); FLA. STAT. ANN. § 61.13001(1)(c) (West Supp. 2011).

<sup>143</sup> FLA. STAT. ANN. § 61.13001(1)(c).

<sup>144</sup> ARIZ. REV. STAT. ANN. § 25-408(B).

<sup>145</sup> See, e.g., *Burgess*, 913 P.2d at 481–83 (stating that bright-line rules are inappropriate in relocation cases and that existing custody arrangements need not be scrutinized by the courts unless the noncustodial parent shows a substantial change in circumstances that renders a change in custody "essential or expedient" to protect the child's welfare); *Tropea*, 665 N.E.2d at 150–51 (rejecting bright-line tests and ruling that relocation cases must be assessed on their particular facts, taking into account the effect that the relocation will have on the visitation by the noncustodial parent).

<sup>146</sup> See Duggan, *supra* note 4, at 201, 203–04 (finding it absurd that, in both *Burgess* and *Mason*, courts would consider whether an increase of less than an hour of travel time would be too disruptive to the current custodial plan).

<sup>147</sup> 665 N.E.2d at 146, 152.

<sup>148</sup> *Id.*

todial parent, to relocate within the state with her children.<sup>149</sup> In that case, however, the distance of the proposed move was only forty miles, showing that the California courts are willing to assess whether such a short distance will render a sole custody plan untenable.<sup>150</sup>

Logically, when joint physical custodians alternate their duties on a daily basis, relocations of short distances, as in *Burgess*, would disrupt the current custodial plan.<sup>151</sup> In 2006, in *Mason v. Coleman*, the Massachusetts Supreme Judicial Court prohibited a joint-custodial mother from moving from Chelmsford, Massachusetts to Bristol, New Hampshire,<sup>152</sup> approximately a seventy-five-minute drive from the joint-custodial father's home.<sup>153</sup> The *Mason* court, however, provided no clear guidelines for this determination, noting that not all relocations outside of the state will impair the joint custody relationship; the trial judge must decide, based on all of the circumstances, whether an increase in travel time or cost will significantly impair either party's ability to exercise their custodial responsibilities after the relocation.<sup>154</sup>

*Mason* additionally raises the possibility that parties exercising joint custody may take affirmative steps to curtail the trial court's broad discretion to determine what distance necessitates a change in custody.<sup>155</sup> In that case, the parents stipulated in their initial custody agreement, which was later merged into their divorce decree, that either parent could move within twenty-five miles of Chelmsford, Massachusetts.<sup>156</sup> Therefore, when the father decided to move from Chelmsford to Nashua, New Hampshire, a distance of approximately seventeen miles, the parents' custody plan was allowed to continue uninterrupted.<sup>157</sup> Negotiating acceptable boundaries before a move is planned may provide a

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<sup>149</sup> 913 P.2d at 476.

<sup>150</sup> *See id.* (noting that the proposed new domicile would be only forty miles away). In a *reductio ad absurdum*, one commentator noted that, per this logic, courts might entertain a relocation dispute when one parent seeks to move from Greenwich Village to Harlem, a journey that would take about the same amount of time as the drive in *Burgess*. Duggan, *supra* note 4, at 201.

<sup>151</sup> *See Mason*, 850 N.E.2d at 518 (describing how joint physical custody requires constant cooperation to schedule activities, arrange for transportation, and make quotidian decisions).

<sup>152</sup> *Id.* at 515–16.

<sup>153</sup> Duggan, *supra* note 4, at 204.

<sup>154</sup> 850 N.E.2d at 519–20.

<sup>155</sup> *See id.* at 515 (noting that parties had previously agreed that they would live within twenty-five miles of Chelmsford, Massachusetts).

<sup>156</sup> *Id.*

<sup>157</sup> *See id.* (noting that the mother did not file suit to object to the father's move though she objected privately). The court did not address what would have been decided if the mother petitioned the court to block his relocation. *See id.*

means to avoid conflict when, as in *Mason*, one party is surprised by the other's sudden desire to relocate.<sup>158</sup>

### B. *The Risk of Losing Custody Through Litigation*

Whenever the judge modifies a custodial plan due to relocation of a parent, one party will benefit by receiving greater access to the child and the other will suffer a loss of significant time with the child.<sup>159</sup> If a court finds that the move will render the current joint physical custody plan untenable and that it would be in the child's best interests to move with the relocating parent, the court will often alter the custodial arrangement to grant the relocating parent primary physical custody.<sup>160</sup> In 2005, in *Watson v. Watson*, the Tennessee Court of Appeals affirmed the trial court's finding that the child's welfare would be best served by living with his mother, who sought to move to a different city in Tennessee.<sup>161</sup> The court, finding that the mother had already moved and thus that the joint physical custody arrangement could not continue,<sup>162</sup> designated the mother as the primary residential parent.<sup>163</sup> The court decided that the child should live with the mother during the school year and with the father during the summer.<sup>164</sup> Similarly, in the 2000 Superior Court of New Jersey, Appellate Division, case of *Chen v. Heller*, the court found that it would be in the best interests of the children to move with their mother from New Jersey to Texas and granted the mother primary residential custody, thus altering the prior equal division of custodial responsibility.<sup>165</sup> In both of these cases, the courts forced the fathers of the children, who hitherto equally divided child-

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<sup>158</sup> See *id.* (noting that the mother had little advanced notice of the father's move to Nashua but did not file suit to prevent it).

<sup>159</sup> See STAHL, *supra* note 133, at 84 ("The sad reality in most relocation cases is that one parent does gain, one parent does lose, and the child almost always suffers, no matter the outcome.").

<sup>160</sup> See, e.g., *Chen*, 759 A.2d at 885, 886 (altering the joint physical custody arrangement by giving the mother primary physical custody and thus allowing her to relocate the children to Texas); *Watson v. Watson*, 196 S.W.3d 695, 700, 703 (Tenn. Ct. App. 2005) (designating the mother as primary residential parent so that the children would be allowed to live in her new domicile during the school year).

<sup>161</sup> 196 S.W.3d at 700, 703.

<sup>162</sup> *Id.* at 702–03.

<sup>163</sup> *Id.* at 703.

<sup>164</sup> *Id.*

<sup>165</sup> 759 A.2d at 885, 886.

care responsibilities with the mothers, to accept a less prominent role in the lives of their children.<sup>166</sup>

Conversely, family courts may find that relocation will disrupt the child's ties to friends and family, especially the nonrelocating parent; thus, the child's interests are best served by remaining in the current, stable place of residence.<sup>167</sup> In such cases, the courts often view the relocation of one parent as inevitable, rendering the status quo untenable.<sup>168</sup> To prevent the child from relocating, the courts grant the nonrelocating parent primary physical custody, subject to visitation by the relocating parent.<sup>169</sup> In this situation, the relocating parent must accept the more circumscribed role mandated by the court.<sup>170</sup> For instance, in the 1994 case *Connelly v. Connelly*, the Court of Appeal of Louisiana affirmed the trial court's grant of sole custody to the father, subject to visitation by the mother, after she had moved to Virginia.<sup>171</sup> The trial court had found that staying with the father in Louisiana, where the

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<sup>166</sup> See *id.* at 886 (explaining that the move and change in custody will reduce the father's day-to-day interaction with his children to visits during school breaks and daily phone and computer/video conversations); *Watson*, 196 S.W.3d at 697, 703 (describing how the previous plan of alternating physical custody of the child daily would be replaced by a plan in which the child resides primarily with the mother during the school year and primarily with the father during the summer months).

<sup>167</sup> See, e.g., *Connelly v. Connelly*, 644 So. 2d 789, 797 (La. Ct. App. 1994) (affirming that the move would be detrimental to the child as he would lose the stable environment of his home city, school, friends, and family); *Sara P. v. Richard T.*, 670 N.Y.S.2d 964, 967 (Fam. Ct. 1998) (stating that “[u]ndoubtedly, the best arrangement for [the child] would be for her mother to return to Rochester and continue the equal parenting arrangement” and that an important factor in the analysis is that the child is settled and doing well in the local school); see also *Raines*, *supra* note 7, at 656 (arguing that relocation should rarely be allowed under joint custody plans as the child is negatively impacted by the stress of changing residences and losing contact with one parent); cf. *Voit*, 721 A.2d at 327 (indicating that it would be impossible to show that being raised by one parent after the move would be better for the child's welfare than continuing to be raised by both parents in the current domicile).

<sup>168</sup> See, e.g., *Voit*, 721 A.2d at 327 (“Furthermore, for purposes of these proceedings, the court assumes that [the father] will move.”); *Sara P.*, 670 N.Y.S.2d at 967 (noting that the mother has already moved and has no intention to reside in New York again).

<sup>169</sup> See, e.g., *Connelly*, 644 So. 2d at 795–97, 799 (affirming the trial court's finding that relocation would be against the child's best interests and therefore awarding the father sole custody subject to visitation by the mother); *Sara P.*, 670 N.Y.S.2d at 967–68 (awarding the father primary physical custody, subject to substantial blocks of visitation time with the mother, because it was in the child's best interests to remain in New York with her father).

<sup>170</sup> See, e.g., *Connelly*, 644 So. 2d at 791, 799 (reducing the relocating mother's role from primary residential parent under a joint custody plan to noncustodial parent with visitation rights); *Sara P.*, 670 N.Y.S.2d at 968 (reducing the joint-custodial mother's role from approximately one-half of childcare responsibilities to visitation during holidays and school recesses).

<sup>171</sup> 644 So. 2d at 792, 799.



child was engaged in extracurricular activities and had many close friends and relatives, would better promote the child's welfare than moving with his mother to Virginia, where he had only one friend and no relatives.<sup>172</sup> Similarly, in the 1998 case of *Sara P. v. Richard T.*, the Family Court of Monroe County, New York, found that the child's best interests would be promoted by remaining in New York with her friends and both parents.<sup>173</sup> As the mother was unwilling to return from South Carolina, the court maintained the decree authorizing joint physical custody but set the child's primary residence with the father and granted him significantly greater rights to spend time with the child.<sup>174</sup>

In some jurisdictions, when the move has yet to occur and is not considered to be inevitable, the courts may simply decide to deny permission to relocate the child, thereby forcing the relocating parent either to surrender joint-custodial rights or to abandon the plan to move.<sup>175</sup> In 2006, in *Mason v. Coleman*, the Massachusetts Supreme Judicial Court noted that, in joint physical custody cases, a child's interests will typically favor continuing the child's close relationship with both parents.<sup>176</sup> Unsurprisingly, the court in *Mason* affirmed the family court's ruling that it would not be in the children's best interests to be "uproot[ed]" from their father's care and superior school system if they were to move to New Hampshire.<sup>177</sup> The Supreme Judicial Court, through affirming the family court's order denying permission for the children to relocate, attempted to maintain the status quo to the detriment of the mother who sought to live near her parents.<sup>178</sup>

The 1996 Illinois Supreme Court case of *In re Marriage of Smith* provides an example of a joint custody case in which both parents re-

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<sup>172</sup> *Id.* at 797.

<sup>173</sup> 670 N.Y.S.2d at 967.

<sup>174</sup> *Id.* at 967-68.

<sup>175</sup> See *Mason*, 850 N.E.2d at 516-17, 520 (continuing a joint custody plan and denying the mother permission to relocate her children to New Hampshire when the move had not yet occurred); *Davis v. Davis*, 970 P.2d 1084, 1086, 1088 (Nev. 1998) (affirming the denial of the mother's petition to relocate the children to Florida when the mother had not yet moved); *Smith*, 665 N.E.2d at 1211, 1214-15 (denying the mother permission to relocate to New Jersey with her children before the mother had moved); *Fingert v. Fingert (In re Marriage of Fingert)*, 271 Cal. Rptr. 389, 392 (Ct. App. 1990) (stating that denying a mother permission to relocate with her child would force her "to choose between her right to resettle, find new employment, start a new life and retain custody of her child").

<sup>176</sup> 850 N.E.2d at 519.

<sup>177</sup> *Id.* at 520, 521.

<sup>178</sup> See *id.* at 515-16, 519-20 (denying the mother's relocation with children to her parent's residence because it would be in the children's best interests to continue cultivating a close relationship with their father).

ceived an unfavorable judgment.<sup>179</sup> As in *Mason*, the *Smith* court affirmed the lower court's decision denying permission for the mother to relocate with her children.<sup>180</sup> The court decided that she could not bring her children to live in her new spouse's home in New Jersey because the move would be too stressful for the children and would impair their relationship with their father in Illinois.<sup>181</sup> The children's father, however, won a pyrrhic victory, losing his status as joint custodian.<sup>182</sup> Despite enjoining the children's move, the lower court granted sole custody to the mother, finding that the children were negatively impacted by the hostility that their custody plan fostered.<sup>183</sup> This harsh result left the father with significantly less right to raise the children than he had before the litigation and forced the mother—now the sole custodian of the children—to abandon her plan to live with her new spouse in New Jersey.<sup>184</sup>

### III. NON-ADVERSARIAL RESOLUTIONS

In relocation cases, decisions based on the pliable best interests of the child standard can fundamentally alter the lifestyle and family dynamic of joint custodians, diminishing the role of one parent in the child's life or forcing a parent to choose between retaining custody or seeking the emotional and financial benefits of relocation.<sup>185</sup> This has troubled some commentators who assert that the mental health of divorced parents and their children is best promoted by affording them stability and agency in their affairs.<sup>186</sup> Furthermore, family court judges often know little about the intimate details of the family's relationship, and thus are limited in their ability to alter joint physical custody plans

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<sup>179</sup> See 665 N.E.2d at 1212, 1214–15 (depriving the father of joint-custodian status and forbidding the mother from relocating).

<sup>180</sup> See *id.* at 1214–15; see also *Mason*, 850 N.E.2d at 520, 521.

<sup>181</sup> *Smith*, 665 N.E.2d at 1213–15.

<sup>182</sup> *Id.* at 1210, 1212.

<sup>183</sup> *Id.* (noting that this issue was not appealed).

<sup>184</sup> See *id.* at 1210, 1212, 1214–15 (reducing the father's status from joint physical custodian to noncustodial parent and denying the mother's request to move to her spouse's New Jersey home).

<sup>185</sup> See *supra* notes 159–184 and accompanying text.

<sup>186</sup> See Duggan, *supra* note 4, at 196; Raines, *supra* note 7, at 654–55 (stating that litigating relocation cases is expensive and exposes the parties to loss of joint-custodian status and parenting time); *id.* at 649, 651, 654 (citing several studies showing that children benefit from continued relationships with both parents and that children are negatively impacted by the stress of moving away from a stable home and the reduction of time spent with one parent).

to best fit the changing needs of the family in relocation cases.<sup>187</sup> To mitigate these concerns, many states have experimented with alternative means of dispute resolution in child custody cases, including settlement, mediation, and the use of guardians ad litem (“GALs”).<sup>188</sup>

GALs are sometimes appointed by a family court judge to independently investigate the facts of a child custody case and recommend to the judge what type of custodial plan would likely fulfill the needs of the child and family.<sup>189</sup> The judge, however, makes all final decisions concerning the custodial plan.<sup>190</sup> GALs are often trained in the sciences of psychology, social work, or child development, as well as the law of child custody, and thus are able to provide the judge with an expert opinion as to what would be best for a particular child’s development.<sup>191</sup> Another benefit to using GALs is that they have more extensive fact-finding powers than a judge, and thus can better understand the problems and potential solutions in relocation cases.<sup>192</sup> GALs are able to visit the child at home, observe day-to-day interactions with parents, and interview all of the relevant people in the child’s life.<sup>193</sup> The use of GALs, however, does not change the fact that a judge retains broad discretion to determine which parent will win or lose the case.<sup>194</sup>

If they wish to avoid adjudication by an outsider entirely, joint-custodial parents may instead privately alter their custody plans to mitigate the effects of relocation or to make alternative arrangements that best fit the needs of all parties.<sup>195</sup> Generally, statutes or provisions in the custody arrangement that govern relocation procedures require a relocating custodial parent to notify the other parent of intentions to move.<sup>196</sup> Some states encourage the parents to attempt such a settle-

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<sup>187</sup> See Duggan, *supra* note 4, at 196 (stating that a family court judge’s fact-finding capacity is limited by courtroom procedure and that parents, who always know more about their children, are better able to promote their children’s interests).

<sup>188</sup> See *infra* notes 189–209 and accompanying text.

<sup>189</sup> KATZ, *supra* note 9, at 109.

<sup>190</sup> See Tara Lea Muhlhauser, *From “Best” to “Better”: The Interests of Children and the Role of a Guardian ad Litem*, 66 N.D. L. REV. 633, 640 (1990) (“In all cases, the weight given the [GAL’s] recommendation is purely discretionary.”).

<sup>191</sup> KATZ, *supra* note 9, at 109.

<sup>192</sup> See *id.* (describing a GAL’s ability to investigate a child’s lifestyle out of court).

<sup>193</sup> *Id.*

<sup>194</sup> See Muhlhauser, *supra* note 190, at 640.

<sup>195</sup> See Duggan, *supra* note 4, at 193, 210 (encouraging parents to settle relocation disputes to avoid litigation under unpredictable standards).

<sup>196</sup> See, e.g., ARIZ. REV. STAT. ANN. § 25-408(B) (2007 & Supp. 2010) (West) (requiring relocating parent to give the other custodial parent sixty days’ notice before moving); KATZ, *supra* note 9, at 113 (noting that the divorce decree may provide for alternative procedures in the event of relocation); ALI PRINCIPLES, *supra* note 22, § 2.17(2) (requiring

ment to avoid litigation.<sup>197</sup> As the parents spend each day with the child and intimately know the child's needs, they are better situated than a judge, who must rely on a formal, litigious fact-finding process, to craft a custodial plan that will promote the child's best interests.<sup>198</sup> Privately altering custody plans benefits both parents and their children, as it saves them the emotional rollercoaster and expenses of litigation.<sup>199</sup> Furthermore, this solution is favorable to both parties in that it avoids loss of custody against the parent's wishes through litigation.<sup>200</sup>

Ideally, parents could negotiate a solution on their own as part of the notification process.<sup>201</sup> When joint physical custodians spend approximately equal time raising the child, the parents are required to cooperate to serve the child's best interests, continually making joint decisions that affect the child's welfare.<sup>202</sup> Although it would seem that these parents should be able to amicably alter their custodial plan in light of relocation, several commentators have observed that relocation disputes—even among joint custodians—are particularly unlikely to settle, as both parents may wish to continue as equal or even primary caregivers to the child.<sup>203</sup>

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that the relocating parent give the nonrelocating parent sixty days advance notice of relocation and a proposal for how the custodial arrangements should change).

<sup>197</sup> See, e.g., FLA. STAT. ANN. § 61.13001(2) (West Supp. 2011) (stating that, if all persons entitled to access to or time-sharing with the child agree to the relocation and provide for a new schedule for custody or visitation, then there is no need to hold an evidentiary hearing).

<sup>198</sup> See Duggan, *supra* note 4, at 196.

<sup>199</sup> See MIMI E. LYSTER, CHILD CUSTODY: BUILDING PARENTING AGREEMENTS THAT WORK 9-5 (4th ed. 2003) (stating that developing a plan for relocation in advance will save the "time, expense, and emotional cost" of litigation); Duggan, *supra* note 4, at 194-95 (arguing that settlement is preferable to litigation in part because litigation encourages rancorous interaction and drains parents' assets).

<sup>200</sup> See Raines, *supra* note 7, at 642 (citing studies that reveal greater satisfaction and compliance with mediated solutions); see also *In re Marriage of Smith*, 665 N.E.2d 1209, 1210, 1212 (Ill. 1996) (noting that the father lost joint-custodian status when he challenged the mother's move).

<sup>201</sup> See Duggan, *supra* note 4, at 193, 195-96, 210 (arguing that parents should settle relocation cases because the parents are best situated to make such important decisions in the child's life and because the adversarial nature of court proceedings cannot possibly reach a result that is in the child's best interests).

<sup>202</sup> See *Mason v. Coleman*, 850 N.E.2d 513, 518 (Mass. 2006) (noting that joint physical custody requires both parents to cooperate to manage the child's everyday life and "necessitates ongoing joint scheduling and provision for supervision and transportation of children between homes, schools, and youth activities"); KATZ, *supra* note 9, at 112 ("It is obvious that joint custody requires unusually cooperative and financially sound parents and a child who is agreeable to the arrangement to make it succeed.").

<sup>203</sup> See STAHL, *supra* note 133, at 84 (explaining that settlements are rare in relocation cases because parents are "rigid in their positions" and see few alternatives); Duggan, *supra*

When a privately negotiated settlement remains elusive, formal mediation is a potential means of reaching a mutually agreeable solution to the issues relocation raises.<sup>204</sup> Recently, mediation has gained near ubiquitous acceptance as a means of resolving custody disputes outside of the courtroom, and many states' family courts may order the parties to attempt mediation before the case is tried.<sup>205</sup> Alternatively, the parties could hire a private mediator before filing suit.<sup>206</sup> Mediators are neutral third parties that are experienced in techniques to aid litigants in reaching agreements on their own.<sup>207</sup> If negotiations fail and the parents must go before the court, statements made during negotiations usually remain confidential.<sup>208</sup> Litigation, however, is rarely necessary, as mediators are often able to overcome impasses through creative solutions and methods of conflict resolution.<sup>209</sup>

#### IV. FINDING THE BEST SOLUTION TO RELOCATION DISPUTES THROUGH MEDIATION AND LITIGATION

The above mentioned non-adversarial means of resolving relocation disputes could, in some instances, mitigate the difficulties courts and commentators have identified in joint physical custody relocation cases.<sup>210</sup> Such practices could help curtail judicial discretion and prevent parents from being stripped of their custodial rights through the adversarial process.<sup>211</sup> When joint physical custodians file suit to relocate or prevent relocation, they introduce acrimony that can destroy the ideally cooperative and trusting familial relationships.<sup>212</sup> Section IV.A argues that family courts should order all joint physical custodians to mediate their relocation disputes before resorting to adversarial liti-

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note 4, at 197 (noting that relocation cases are "almost impervious to settlement"); Raines, *supra* note 7, at 645-46 (noting that although there is often less litigation involved in maintaining joint custody relationships, the cooperation tends to break down once one parent decides to relocate).

<sup>204</sup> See Lyster, *supra* note 199, at 11-2 (describing mediation as a "well-accepted" means of resolving custody disputes).

<sup>205</sup> *Id.*; see *id.* at 11-10 (listing forty-two states and the District of Columbia as jurisdictions where a court may order mediation before trial).

<sup>206</sup> *Id.* at 11-2, -10.

<sup>207</sup> See *id.* at 11-2 to -3 (describing role of mediators).

<sup>208</sup> *Id.* at 11-2.

<sup>209</sup> *Id.* at 11-6, -7 (explaining that mediators are skilled at reducing conflict and that parents reach agreements in approximately seventy percent of cases submitted to mediation).

<sup>210</sup> See *infra* notes 216-243 and accompanying text.

<sup>211</sup> See *supra* notes 20-184 and accompanying text.

<sup>212</sup> See Duggan, *supra* note 4, at 196-97.

gation.<sup>213</sup> Section IV.B explains that when parents are unable to reach a solution in mediation, the family court should modify their custody plan, using a formulation of the best interests of the child standard that does not unfairly place the burden of proof on either parent and allows the judge, with the help of a guardian ad litem (“GAL”), to consider multiple factors specific to each case.<sup>214</sup> Though such an approach as outlined in Section IV.B would do little to eliminate the unpredictability or harsh results of relocation litigation, it provides a viable second-choice method to ensure the child’s interests are protected when intractable joint custodians can no longer cooperate to continue their current parenting plan.<sup>215</sup>

### A. Mandated Mediation

All states’ family courts should mandate that joint physical custodians attempt to resolve their relocation disputes through mediation before the case is submitted to adversarial litigation.<sup>216</sup> If both parents are able to compromise, they will ultimately be able to find a better solution for their family than any judge could devise.<sup>217</sup> Custodial parents spend large blocks of time with their children and are better situated to decide what is best for their children than a judge who has not had the opportunity to observe the child’s home-life first hand.<sup>218</sup> If the parents can put aside their animosity, they could negotiate a new parenting plan that best fits their needs, including provisions that would not be obvious to a judge.<sup>219</sup> Finally when both parents compromise to devise

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<sup>213</sup> See *infra* notes 216–243 and accompanying text.

<sup>214</sup> See *infra* notes 244–283 and accompanying text.

<sup>215</sup> See *infra* notes 250–255, 276–278 and accompanying text.

<sup>216</sup> See LYSTER, *supra* note 199, at 11-10 (listing many states in which judges may order parents to mediate custody disputes before trial); Duggan, *supra* note 4, at 210 (arguing that courts should encourage parents to resolve relocation disputes on their own); see also Elrod, *supra* note 5, at 367–68 (explaining that parents often can reach mediated solutions in relocation cases and stating that mediation should be encouraged or mandated by the courts).

<sup>217</sup> See Duggan, *supra* note 4, at 195–97 (explaining that judges, with their limited knowledge of a family’s situation, must blindly guess at the best solution, whereas parents who know more about the child are better prepared to promote the child’s interests).

<sup>218</sup> See *id.* at 196 (“Judges always know less than parents.”).

<sup>219</sup> See LYSTER, *supra* note 199, at 9-6 (suggesting creative solutions to relocation issues that parents may adopt in mediation); STAHL, *supra* note 133, at 84; Duggan, *supra* note 4, at 196 (stating that parents may make day-to-day adjustments under a negotiated custodial plan, but a judge must issue an inflexible order that remains in effect until the case is relitigated).

a workable parenting plan, there is no absolute winner or loser.<sup>220</sup> Both parents are able to continue to develop meaningful relationships with their children, and neither parent will have reason to feel resentment towards their ex-spouse or the court for unilaterally depriving the parent of custody over the child.<sup>221</sup>

By agreeing to an alternative custodial plan through mediation, both parents can continue to reap the psychological benefits of joint-custodial plans and avoid the psychological harm of being deprived of parental rights at the discretion of the court.<sup>222</sup> Commentators have praised the benefits of joint over sole custody, particularly for divorced fathers who, under sole custodial arrangements, would be expected to play only a limited role in their child's life.<sup>223</sup> Instead of occasional visitation, parents with joint physical custody are able to make decisions for the child and take an active role in their upbringing.<sup>224</sup> Given a sense of involvement and agency in the decisions affecting the child, joint custodians are less likely to suffer from post-divorce depression.<sup>225</sup> Under joint physical custody plans, both parents serve as primary caregivers for their children and are required to work together,<sup>226</sup> likely leading to even greater psychological benefits.<sup>227</sup> To be deprived of such a close

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<sup>220</sup> See Duggan, *supra* note 4, at 194–96 (suggesting that much of the harm that results from litigation arises from the feelings of both parents that they are engaged in an all-or-nothing battle over their children).

<sup>221</sup> See *id.* at 196 (arguing that adversarial litigation creates entrenched feelings of animosity between the parents); Raines, *supra* note 7, at 642 (citing studies that show that parents that mediate custody plans are more likely to comply with child support obligations and less likely to initiate further adversarial proceedings).

<sup>222</sup> See *infra* notes 223–229 and accompanying text.

<sup>223</sup> See Kindregan, *supra* note 4, at 33, 34 & n.14 (citing generally Brinig & Buckley, *supra* note 40 (recognizing that joint physical custody results in increased support for children) and Andrew Shepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687 (1985) (noting that some scholars have praised the benefits of joint custody, including greater parental cooperation and deeper parent-child relationships)); Raines, *supra* note 7, at 627–29 (noting that joint custody arrangements result in better adjusted children and higher parental self-esteem).

<sup>224</sup> See Raines, *supra* note 7, at 626–27 (stating that, under joint physical custody plans, the child has “frequent and continuing contact with both parents” (internal quotation marks omitted)).

<sup>225</sup> See *id.* at 644 (citing studies that show that joint-custodial fathers had greater self-esteem than sole custodians).

<sup>226</sup> See *Mason v. Coleman*, 850 N.E.2d 513, 518 (Mass. 2006) (stating that shared physical custody requires constant cooperation and subordination of one's own desires to negotiate solutions for scheduling activities, transportation, and supervision); KATZ, *supra* note 9, at 112 (stating that joint physical custody plans “require[] unusually cooperative and financially sound parents” to succeed).

<sup>227</sup> See Raines, *supra* note 7, at 643–44 (citing studies that show greater psychological benefits to children and parents when they spend more time together).

relationship against one's will by the court system would impose far greater stress and feelings of loss than if both parents could compromise on a new parental plan—even if one parent agreed to give up some access to the child.<sup>228</sup> Finding a mutually agreeable solution empowers parents to decide their own fate and avoid the uncertainty of litigated outcomes.<sup>229</sup>

Perhaps the best solution in a relocation case is one that the courts would be unwilling or unable to consider.<sup>230</sup> For instance, both parents may agree to move to the new location so that the current plan for equal division of childcare may be continued.<sup>231</sup> Or, the relocation may be delayed until the child is able to enroll in or graduate from school so that the transition will be easier on all parties involved.<sup>232</sup> When the parents compromise to develop a new parenting plan, they are free to adopt these non-traditional solutions.<sup>233</sup> Conversely, family courts, knowing little about the lifestyles or desires of the parents, generally decree a more traditional plan of sole custody vested in one parent subject to visitation by the other.<sup>234</sup> Furthermore, if one parent seeks to move to a new location for a job that requires long hours but will result in significant financial gains, the parents may decide that it is best if the child lives primarily with the other parent, but travels (perhaps by air) for holiday and weekend visits.<sup>235</sup> On the other hand, less affluent parents may

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<sup>228</sup> See STAHL, *supra* note 133, at 84 (“[In relocation cases,] one parent usually feels a victory while the other parent feels a loss. . . . [A]nd, the child almost always suffers, no matter the outcome”); Duggan, *supra* note 4, at 196 (stating that litigation “disempower”[s] parents to reach a solution on their own, creating animosity between them, the lawyers, and the judge, and inducing the parents to rely on adversarial means to solve future disputes).

<sup>229</sup> See Raines, *supra* note 7, at 642 (finding greater compliance with, and less alienation over, child support obligations when freely accepted in mediation instead of imposed by a court).

<sup>230</sup> See Weiner, *supra* note 20, at 1749–50 (stating that courts often try to solve relocation cases by altering visitation to accommodate the move instead of looking at other options that could allow the current parenting plan to continue, such as having both parents relocate to the same locale).

<sup>231</sup> See LYSTER, *supra* note 199, at 9-6 (suggesting this as a possible solution to relocation disputes).

<sup>232</sup> *Id.*

<sup>233</sup> *Cf.* Duggan, *supra* note 4, at 196 (stating that parents have more knowledge of their children's day-to-day lives and therefore can craft more flexible parenting plans than judges who must craft inflexible, binding custody orders based on limited information).

<sup>234</sup> See *id.* at 197, 198 (explaining that the judge must choose one parent to get custody of the child in relocation cases, even if both parents are equally qualified to raise the child).

<sup>235</sup> See LYSTER, *supra* note 199, at 9-4, -6 (stating that relocation and economic changes will often result in alterations to child support agreements and suggesting that parents could alter the physical custody arrangement in favor one parent).



seek to have the children travel as little as possible, spending the school-year with one parent and the summer with another.<sup>236</sup> One parent may prefer to spend more time with the child when the child is older or younger, during school vacations, or during certain seasons of the year to engage in certain favorite activities together.<sup>237</sup> Through mediation, parents could draft a parenting plan that best accommodates preferences and resources that may not be brought to the attention of a family court judge when ordering a change to the custodial plan.<sup>238</sup>

In addition, joint physical custodians are uniquely situated to cooperate and devise parenting plans that best advance the child's interests.<sup>239</sup> As both negotiators have previously been found to be fit custodial parents, they are presumed to have the best interests of their child at heart and to act to promote their child's welfare.<sup>240</sup> Unlike the judge who has learned about the family dynamic and the child's lifestyle solely for the relocation case, the parents have lived with the child for long periods of time and intimately know the child's desires, motivations, and needs.<sup>241</sup> Furthermore, the parents have hitherto successfully maintained a parenting arrangement whereby they exercised equal control over the life of their child, often communicating with each other about important and mundane decisions, as well as coordinating the child's day-to-day activities.<sup>242</sup> The parents in joint physical custody relocation cases thus have a proven track record of working together to find solutions to problems affecting the life of their child and would likely be able to find a mutually agreeable resolution to the problem of relocation as well.<sup>243</sup>

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<sup>236</sup> See *id.* at 9-11 (stating that rotating residences to fit the school calendar is a popular choice of custodial plan).

<sup>237</sup> See DONALD T. SAPOSNEK, *MEDIATING CHILD CUSTODY DISPUTES: A STRATEGIC APPROACH* 146-47 (rev. ed. 1998) (suggesting schedules in which the child spends a certain holiday with the parent who attaches greater significance to the occasion, alternates yearly between houses, or celebrates the holiday at both locations separately).

<sup>238</sup> See LYSTER, *supra* note 199, at 9-6 (listing several mediated solutions to relocation disputes); Duggan, *supra* note 4, at 196.

<sup>239</sup> See *infra* notes 240-243 and accompanying text.

<sup>240</sup> See *Troxel v. Granville*, 530 U.S. 57, 68 (2000) ("[T]here is a presumption that fit parents act in the best interests of their children.").

<sup>241</sup> See Duggan, *supra* note 4, at 196 (stating that the judge knows only what was presented at the hearing—far less than the parents know about their own children).

<sup>242</sup> See *Mason*, 850 N.E.2d at 518 (stating that a joint physical custody plan requires parents to be able to cooperate when organizing "a variety of the details of everyday life").

<sup>243</sup> See *id.* (noting that joint physical custodians must realize that they will sometimes be required to place the interests of the child and the other parent above their own to ensure the success of the plan).

### B. *Litigation as the Second-Best Alternative*

Court mandated mediation, however, may not work for all parents in all cases.<sup>244</sup> Several commentators have remarked that parents in relocation cases are often unable to come to a fair resolution on their own.<sup>245</sup> They are simply too entrenched in their positions, seeking either unfettered freedom to relocate or rigid maintenance of the status quo.<sup>246</sup> In particularly rancorous disputes, or in situations in which the parties cannot easily travel for visitation, the parties may not be able to cooperate or find a workable solution that allows both parents to play an active role in raising the child.<sup>247</sup> In such cases, it would ultimately be necessary for the family courts to serve as neutral arbiters to determine which parent should choose the child's primary residence.<sup>248</sup> If possible, the parents should continue as joint legal custodians, and the court should allow for the child to spend significant blocks of time visiting the nonresidential parent to continue their relationship.<sup>249</sup>

For relocation cases that involve great distances, the judge may be forced to choose one party with whom the child will live during the school year and another party with whom the child will spend school holidays.<sup>250</sup> Thus, one parent will spend significantly less time raising the child than if responsibility was distributed equally.<sup>251</sup> When both parents want to provide at least half of the child's care, such an outcome will be viewed by one party as "losing" the case.<sup>252</sup> Whereas this win or lose mentality is poisonous to an otherwise healthy joint-

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<sup>244</sup> See *infra* notes 245–248 and accompanying text.

<sup>245</sup> STAHL, *supra* note 133, at 84 (stating that relocation cases are difficult to negotiate because both parents refuse to see any alternatives to their settled plans to move or stay); Duggan, *supra* note 4, at 197 (stating that relocation are often "impervious to settlement").

<sup>246</sup> See STAHL, *supra* note 133, at 84 (stating that parents frame relocation cases in absolute terms as a win or loss of custody, feeling that they have no other options but to abide by their desire to move or stay).

<sup>247</sup> See Duggan, *supra* note 4, at 197 (noting that relocation cases will not settle when one parent commits to relocating, leaving her unable to compromise when negotiating a new custodial plan).

<sup>248</sup> See *id.* (stating that parents "look to a family court judge to force one of their hands" when negotiations in relocation cases fail); see also Lyster, *supra* note 199, at 11-14, 16-9 (noting that binding arbitration is an alternative method of reaching a decision, but that only a few states allow arbitration in custody disputes).

<sup>249</sup> See *supra* notes 222–227 and accompanying text (describing the benefits of joint-custodial plans).

<sup>250</sup> See SAPOSNEK, *supra* note 237, at 282 (noting that school-aged children must stay in one home while school is in session, but could spend school breaks with the other parent).

<sup>251</sup> See *id.*

<sup>252</sup> See STAHL, *supra* note 133, at 84 (noting that parents usually regard the results of relocation cases as a victory or loss).

custodial relationship, an adversarial contest is the only appropriate solution after mediation has failed.<sup>253</sup> When parents have refused to cooperate when planning for the future, a joint physical custody plan, which requires constant interactions and negotiations between the parents, may no longer be feasible because of the animosity that has arisen from the proposed relocation.<sup>254</sup> The judge must then alter the custodial plan to provide for less parental bargaining and compromise, inevitably granting one parent rights superior to the other.<sup>255</sup>

As in all jurisdictions previously discussed, the judge should focus on the best interests of the child when deciding which parent should determine the child's residence.<sup>256</sup> This standard must be framed in a manner that does not apply an a priori presumption in favor of either relocation or maintaining the status quo.<sup>257</sup> Presuming that the child's best interests are always best served by either staying in the same community or by relocating would ignore the complexities of each individual case.<sup>258</sup> Furthermore, applying such a presumption would be unfairly prejudicial against a joint custodian who has exercised equal responsibility for the child and thus should be placed on equal footing with the other when assessing who will best promote the child's welfare.<sup>259</sup> If, however, in reality, the joint custodians divided childcare responsibilities unequally, the parent that has provided a clear majority of the child's care, as in a sole custody case, should be appointed the primary residential parent, unless the other parent shows that it would be better for the child to live with the parent who has hitherto provided less care—a difficult burden to meet.<sup>260</sup> Such a rule would promote

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<sup>253</sup> See *supra* notes 159–186, 248 and accompanying text.

<sup>254</sup> See *Mason*, 850 N.E.2d at 518 (stating that a successful joint physical custody plan requires parents to constantly cooperate when organizing the child's day-to-day life); *In re Marriage of Smith*, 665 N.E.2d 1209, 1210, 1212 (Ill. 1996) (noting that the trial judge, having found that the parents' joint physical custody relationship "had deteriorated to the point of complete acrimony," awarded sole custody to the mother).

<sup>255</sup> See *Mason*, 850 N.E.2d at 518 (noting that joint physical custodians must cooperate on a regular basis); *Smith*, 665 N.E.2d at 1210, 1212 (describing a situation in which sole custody was preferable to joint physical custody due to "acrimony" between the parents).

<sup>256</sup> See *supra* notes 20–127 and accompanying text.

<sup>257</sup> See Debele, *supra* note 4, at 76–77 (explaining how a presumption in favor of either parent is unfair to the other).

<sup>258</sup> See *id.*

<sup>259</sup> See *Jaramillo v. Jaramillo*, 823 P.2d 299, 304, 309 (N.M. 1991) (holding that, under a joint custody decree, parents have equal decision-making power and therefore stand on equal footing in relocation cases, even if one parent assumes a majority of everyday care).

<sup>260</sup> See *Burgess v. Burgess (In re Marriage of Burgess)*, 913 P.2d 473, 476, 482 (Cal. 1996) (holding that a parent with a majority of custodial responsibility may relocate with

predictability and the stable maintenance of a close relationship between the child and its primary caregiver.<sup>261</sup>

When both parents divide childcare responsibilities approximately equally, the judge should take a two-pronged approach to decide the case.<sup>262</sup> First, the judge should determine if the distance of the parent's move necessitates a change in the custodial plan.<sup>263</sup> If it is possible to maintain the current joint physical custody plan, even if it would require some increased travel time, the case should be dismissed so that the child is still assured of consistent contact with both parents.<sup>264</sup> For instance, if a parent was planning on moving only an hour's journey from the other, daily commutes would still be possible, and longer journeys would be feasible if made only once a week.<sup>265</sup> In close cases, the judge should consider if fewer journeys with longer stays at each location would allow joint custodians to continue the equal division of responsibility.<sup>266</sup> For such plans to be feasible, the judge must ensure that the children would be able to commute to school from both residences.<sup>267</sup> Additionally, the judge must consider the financial resources of the parents and the ease with which they can provide transportation for the child.<sup>268</sup>

When one parent seeks to move so far away from the other such that an equal sharing of childcare responsibilities would be impossible, the judge should engage in the second prong of the inquiry—identifying which parent is better suited to provide a majority of the child's

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the child unless the other parent shows that it is "essential or expedient" for the child's welfare to prevent relocation).

<sup>261</sup> See *id.* at 476, 480–81 (explaining that requiring a relocating sole custodian to show that the move is necessary would undermine the public policy of preventing costly litigation to "micromanage" everyday decisions and that the sole custodian should usually be allowed to relocate with the child).

<sup>262</sup> See *infra* notes 263–275 and accompanying text.

<sup>263</sup> See *supra* notes 137–158 and accompanying text.

<sup>264</sup> See Raines, *supra* note 7, at 626–27, 651 (explaining how joint physical custody plans "assure a child of frequent and continuing contact with both parents" and that children experience great stress and feelings of loss when one parent decides to relocate (internal quotation marks omitted)).

<sup>265</sup> See *Burgess*, 913 P.2d at 478–79 (affirming the trial court's decision that the mother could relocate with the children when the distance between her new home and the father's home would be an "easy commute," allowing for frequent visits).

<sup>266</sup> Cf. LYSTER, *supra* note 199, at 9-6 (noting that transportation options in mediated solutions will vary depending upon how far apart the parents live).

<sup>267</sup> Cf. SAPOSNEK, *supra* note 237, at 282 (noting that, when parents live far apart, children must spend the school year at one home).

<sup>268</sup> Cf. LYSTER, *supra* note 199, at 7-10 to -11 (noting that the transportation schedule in mediated solutions may depend on the financial resources of the parents or on which parent has vehicle access).

care during the school year—by balancing the move’s benefits and detriments to the child.<sup>269</sup> Because the pros and cons will be different in every case, the judge must be given wide discretion to consider all potential factors; strictly enumerated statutory or common-law lists of relevant factors are impractical.<sup>270</sup> For instance, the benefits of relocation may include being closer to family, enjoying a higher standard of living, or enrolling in a better school.<sup>271</sup> Detriments may include moving away from family and friends (including the nonrelocating parent), the stress of leaving a familiar locale, or a decreased standard of living in the new location.<sup>272</sup> Any factors deemed relevant should primarily affect the child, not truly be benefits or burdens to the parents that are only tenuously attributed to the child’s wellbeing.<sup>273</sup> In addition, the family court judge should take the clearly expressed preferences of the child into account.<sup>274</sup> Ultimately, the judge must determine by a preponderance of the evidence which residence will best promote the child’s interests and declare the parent living in that locale the primary residential parent.<sup>275</sup>

This proposed framework, if put into practice, would be as unpredictable for litigants as many states’ current standards that leave child custody determinations to the discretion of family court judges.<sup>276</sup> If, however, one imagines litigation as only the second-best alternative instead of a default means of resolving relocation disputes, this unpredictability is beneficial.<sup>277</sup> Knowing that their dispute will be resolved by balancing many factors tailored to the specific case, litigants and their

<sup>269</sup> See *Tropea v. Tropea*, 665 N.E.2d 145, 150–51 (N.Y. 1996) (stating that all relocation disputes should be resolved “with due consideration of all the relevant facts and circumstances” by weighing the move’s harms and benefits to discover “what outcome is most likely to serve the best interests of the child”); SAPOSNEK, *supra* note 237, at 282 (noting that the child must spend the school year in one home, but may live with the other parent during school breaks).

<sup>270</sup> See *Sara P. v. Richard T.*, 670 N.Y.S.2d 964, 966–67 (Fam. Ct. 1998) (adding relevant factors to relocation analysis not considered in precedent).

<sup>271</sup> See *Yannas v. Frondistou-Yannas*, 481 N.E.2d 1153, 1158 (Mass. 1985) (noting that relation will benefit the children and their mother financially, socially, and educationally).

<sup>272</sup> See *Connolly v. Connolly*, 644 So. 2d 789, 797 (La. Ct. App. 1994); Raines, *supra* note 7, at 649–54 (describing the emotional traumas suffered by children during relocation).

<sup>273</sup> See *Mason*, 850 N.E.2d at 519 (explaining that an advantage to one joint physical custodian is less relevant to the child’s welfare than an advantage to a sole custodian); *see also supra* note 90 and accompanying text.

<sup>274</sup> Debele, *supra* note 4, at 116–17.

<sup>275</sup> See *supra* notes 128–184 and accompanying text.

<sup>276</sup> See *supra* notes 20–184 and accompanying text.

<sup>277</sup> See *infra* notes 278–279 and accompanying text.

counsel would be unable to predict the outcome.<sup>278</sup> Hoping to avoid the appreciable risk of losing their custodial rights altogether, parents will be encouraged to compromise during mediation, perhaps giving up some time with the child for the assurance of retaining the type of relationship most important to each parent.<sup>279</sup>

To ensure that the best interests of the child are served, the court should use GALs.<sup>280</sup> As experts in child development and child custody disputes, they are able to suggest to the judge what parenting plan would truly be in a specific child's best interests.<sup>281</sup> The widespread use of GALs would also mitigate concerns that judges are ill-equipped to investigate the day-to-day needs and interactions of the family.<sup>282</sup> The GAL is not limited by courtroom procedure for interviewing persons with knowledge of the child's situation, and the GAL is able to spend significant amounts of time observing the child on a daily basis.<sup>283</sup>

## CONCLUSION

When a joint physical custodian relocates only a short distance, and the parenting plan can be maintained with only minor alterations, the parents and family courts should endeavor to maintain the joint physical custody plan. When a parent exercising joint physical custody seeks to relocate a long distance from the other parent, however, the continued operation of the existing parenting plan is impossible. Ideally, the parents will be able to negotiate a solution to this conundrum so that they both can maintain strong relationships with the child. Thus, all family courts should require the parents to attempt to craft a new parenting plan through mediation. Only after a sustained failure to find a solution through mediation should the family court judge be-

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<sup>278</sup> See Debele, *supra* note 4, at 78 (stating that the “best interests of the child” is an amorphous concept” that is difficult for judges and parents “to flesh out and apply”).

<sup>279</sup> See Raines, *supra* note 7, at 654–55 (describing the financial and emotional risks of entering into the adversarial process).

<sup>280</sup> See KATZ, *supra* note 9, at 109 (explaining the fact-finding powers of GALs and their expertise in formulating parenting plans to promote the child's healthy development); Muhlhauser, *supra* note 190, at 639–40 (noting that GALs may make recommendations to the court or participate in proceedings).

<sup>281</sup> See KATZ, *supra* note 9, at 109 (describing GALs as experts in sociology, psychology, and childcare).

<sup>282</sup> See *id.* (explaining how GALs can elicit information more easily than judges); Duggan, *supra* note 4, at 196 (explaining how judges receive only limited information about the child through hearings).

<sup>283</sup> Compare KATZ, *supra* note 9, at 109 (stating that GALs can interview people not present in the courtroom, observe the child at home, and interact with both parents), with Duggan, *supra* note 4, at 196 (describing the limits of a judge's fact-finding capacity).

gin the formal litigation process through the appointment of a GAL. Upon receiving the report of the GAL, the judge should then decide, based on the best interests of the child, which parent is to become the primary residential parent and which parent must be forced to accept a more circumscribed role in childcare. There should be no presumption for or against allowing relocation of the child, but rather the decision must be made by balancing the various benefits and harms that relocation will impose in each individual case. Although this method of adjudication is notoriously unpredictable and will ultimately deprive one party of extensive parental rights, the parents' failure to cooperate during mediation or to devise a more flexible custodial plan necessitates ending the joint-custodial agreement and deciding in favor of whichever parent can provide a better life for the child.

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