



September 28, 2008

Dear Judge Lehrmann and Professor Atkinson:

Thank you very much for forwarding me a preliminary draft of the Uniform Relocation of Children Act. I am sorry that I will be unable to attend your session in Texas as an observer. My teaching commitments are particularly heavy this semester and this prevents me from attending. Therefore, please accept these written comments in lieu of my oral comments.

Let me start by thanking you both for reading my article, *Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation*, 40 UC Davis L. Rev. 1747 (2007), and for incorporating its recommendation into the Proposed Act. My comments in this letter are not reflected in that article, as that article took no position on whether relocation should be favored, tolerated, or disfavored in the law. The article merely suggested that courts should consider the noncustodial parent's mobility when they decide whether or not to permit a relocation by the custodial parent, regardless of the jurisdiction's approach.

This letter, therefore, expresses my opinion about relocation law more generally. While I take no position on which one of the options identified on pages 9-10 of the Proposed Act is the best, four of the options (1, 2, 5 and 6) would advance better than the Proposed Act two objectives that should determine the structure of the law: fairness between the parents and avoiding harm to children. This letter identifies those parts of the Proposed Act that are problematic given these objectives and explains why, in my opinion, the Proposed Act does not represent the best approach for custodial parents, children, or the courts.

Observations

Two preliminary observations frame my evaluation of the Proposed Act. First, noncustodial parents have autonomy of movement, both presently and under the Proposed Act, and courts routinely reconfigure visitation to accommodate the noncustodial parents relocation. If reformers believe that protecting a child's relationship with both parents is crucial, but only do so by imposing restrictions on the custodial parent's movement (albeit by denying the child's relocation), the Act treats custodial parents unfairly. Custodial parents are not less deserving of freedom and autonomy than noncustodial parents, and may in fact be more deserving. I am not suggesting that the Proposed Act necessarily impose restrictions on noncustodial parents;

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that possibility has always been politically unpopular, not to mention of questionable constitutionality. However, acknowledging the inequality is important. Drafters should have it foremost in their minds as they impose requirements and restrictions that affect custodial parents' mobility.

Second, in my opinion, the law cannot be truly neutral as to whether relocation is preferable or not. Even when the law tries to give courts maximum discretion, as the Proposed Act does, the law signals whether relocation is favored or not. The Proposed Act currently signals that relocation is disfavored. Not only do these signals undercut the neutrality desired by the drafters, but the signals may also deter some parents from petitioning for relocation even though a court would find that relocation is best for the custodial parent and child. The signals also create a tone that may disadvantage custodial parents during the adjudication of these cases. The following comments about specific provisions of the Proposed Act illuminate what I mean by the Act's "signals."

Notice

I agree with the Act's requirement that custodial parents give notice before relocating (absent good cause not to do so). However, the Act should impose a similar requirement on the noncustodial parent. Notice is important for many reasons other than merely enabling a parent to stop a relocation. For example, it informs the other parent where future written communication should be sent. However, when notice is imposed only on the custodial parent, it signals that the custodial parent's relocation is more noteworthy, and potentially objectionable, than the noncustodial parent's relocation and that notice is only relevant for purposes of triggering an objection to the proposed move. The AAML Proposed Model Relocation Act requires notice by both parents, as the Act's Commentary mentions (p. 7), and that formulation seems preferable.

Permission versus Lack of Objection

I strongly disfavor the Act's position that permission must be given by the court or other parent prior to a relocation. That formulation injects a *ne exeat* clause into every existing and future agreement.

As for existing agreements, the Act essentially modifies them. Many of these agreements were undoubtedly carefully negotiated against the backdrop of the then existing law. Applying the Proposed Act undermines the parties' autonomy and unfairly disadvantages one of the parties. Therefore, at a minimum, the Act should only be applied prospectively, *i.e.* to agreements or orders made after the effective date of the Proposed Act.

However, the Proposed Act's formulation is troubling even for orders entered after its adoption. Requiring permission is akin to a presumption against relocation, regardless of the Act's attempt to avoid such a position through its commentary, its lack of a burden of proof, and its fact-intensive approach. When parents disagree about a proposed relocation, the custodial parent will have to institute suit. Courts will expect the custodial parent to prove why he or she should be allowed to relocate since the custodial

parent is the moving party and needs the court's permission to relocate the child. The mere fact that the custodial parent is the moving party imposes a subtle message that something must be proven to change the status quo, and it the moving party's burden to do so.

An alternative and better formulation would require that the non-custodial parent object to the proposed relocation after notice is given. This formulation is found in the law of various states, as indicated in the Commentary on page 8 (Alabama, Missouri, South Dakota, and Washington). The advantages of the "lack of objection" formulation are many. First, it gives both parents input into the relocation decision, without requiring that the custodial parent seek anyone's permission. The custodial parent need only give notice, and may never have to do anything else. This formulation seems preferable given the ease with which noncustodial parents can relocate even though the noncustodial parent's move may have a large impact on the child and the custodial parent.

Second, and more importantly, it puts the burden of initiating litigation on the noncustodial parent. This burden should be allocated to the person without the day-to-day responsibilities for the child, for custodial parents will generally have more difficulty initiating litigation because of childcare responsibilities. In addition, initiating proceedings can be expensive and time-consuming, putting the party who has to initiate such proceedings at a bargaining disadvantage. Therefore, the Proposed Act, as written, hands the noncustodial parent a tool by which he or she can easily extract concessions from the custodial parent even if the noncustodial parent's objections to the relocation are frivolous. The tool is especially powerful since a petition by the custodial parent to relocate opens up the issue of custody. The cost, inconvenience, and risks in seeking permission means that parents seeking to relocate will undoubtedly give concessions to obtain the noncustodial parent's permission, even if a court might ultimately have granted the custodial parent permission to relocate the child. If the Act plays out in this way, it will work to the ultimate disadvantage of children because custodial parents and their children are economically interdependent.

Third, the proposed alternative formulation (requiring the non-custodial parent to institute litigation to stop the relocation) should result in fewer court hearings than what might be expected under the Proposed Act. Less litigation is a substantial benefit: attorneys' fees take resources out of the family and litigation promotes conflict. The Proposed Act will encourage litigation because it is far easier for a noncustodial parent to say no when the custodial parent requests permission than it is to begin a court proceeding to stop the relocation. The ease with which the noncustodial parent can object, and the economic incentive to do so, suggests there will be many objections made for bargaining purposes, and these will trigger either the custodial parent's litigation or concession. The number of lawsuits instituted by custodial parents who have a legitimate reason to relocate but who encounter a noncustodial parent's bad faith (i.e., an objection solely for bargaining purposes) should exceed the number of lawsuits deterred by the Act that would otherwise be brought by custodial parents who seek to relocate in bad faith.

I also believe that third parties should have standing to object to a relocation only if they would also have standing to seek custody under the state's third party custody statute. Most, if not all, states now have third party custody laws and the standing

requirement in the Proposed Act is undoubtedly different from the standing requirement in the third party custody statutes. These differences may create the oddity that a person would have standing to stop a relocation, but not to obtain custody if the custodial parent leaves anyway (without the child). Additionally, the Proposed Act permits many more third parties to have standing to object than does Washington's law, on which it is based. The Proposed Act omits the key phrase "primary residential care provider" and uses instead the phrase "the third party [who] has lived with the child and acted in the roll of parent." The undefined term "parent" may permit far more individuals to challenge a child's relocation than the phrase "primary residential care provider." If so, the formulation raises concerns about whether such a liberal standing requirement is warranted considering issues of fairness (third parties have no say over the noncustodial parent's mobility), children's needs for stability (prohibiting a child's relocation may separate the child from his or her primary caregiver), and children's well-being (the custodial parent's happiness or depression can affect the child).

Burden of Proof

The absence of a burden of proof in section 6 is odd, although I acknowledge that a number of states follow this approach. I know of no empirical research on the operation of those provisions, but my suspicion is that courts actually operate with a burden of proof in those states, albeit an undisclosed one. I imagine that the parent who petitions the court, either the custodial parent for permission to relocate or the noncustodial parent for custody, ends up with the burden. If my suspicion is correct, then judges implementing this Act will, in fact, *always* place the burden on the custodial parent to show why she should be able to move. Simply, once the noncustodial parent denies permission to relocate the child, the custodial parent must go to court to get permission. This implicit burden of proof seems unfair since the custodial parent cannot hinder the noncustodial parent's mobility or have visitation terminated as a consequence of the noncustodial parent's relocation.

Factors in Section 7

Although the factors mentioned in Section 7 are not exclusive, the list omits some that are critical. For example, the court is not told to consider whether the non-custodial parent wants, or is able, to have custody of the child. Since the court cannot restrict the custodial parent from moving, but only the child, the court should consider this fact when deciding whether to permit the child's relocation.

In addition, the Proposed Act fails to prompt a consideration of the equities involved. There are two options for keeping the parents proximate. Either the court can deny the child's relocation, so that the custodial parent has an incentive to remain, or the court can permit the relocation, so that the noncustodial parent has an incentive to move. The court should compare these two options, along with the possibility that the family will be separated no matter what it decides (with either the custodial or noncustodial parent being separated from the child). Unfortunately, the list of factors in section 7 fails to adequately prompt an analysis of the equities between the parents and the best arrangement for the child given these options.

For example, the sixth factor requires an analysis of the “likelihood of improving quality of life for the party who seeks to relocate and the degree to which such improvements in quality of life benefit the child.” Yet the court should also consider the disadvantage to the custodial parent from remaining versus the advantage/disadvantage to the noncustodial parent from relocating with the custodial parent and child. The eighth factor (“the feasibility of both parties relocating”), which I am glad to see included, tries to get at this comparison, but it only looks at “feasibility” and does not ask the court to compare the equities. Also, “feasibility” is unduly limited by the Commentary. It suggests that the factor only applies if the noncustodial parent “is in a position to relocate,” and uses as an example the “consultant whose main work involved traveling around the country.” Yet a comparison should be required in all cases, for in each and every case it is possible for the noncustodial parent to move. It is just a question of how much inconvenience/disadvantage that person will face, and how that hardship compares to the inconvenience/disadvantage that would be imposed on the custodial parent if the custodial parent is required to remain.

I am glad to see the fourth factor listed: “history or threats of domestic violence.” The Commentary says that the “weight” of the factor “could depend on the recency of the abuse.” This comment may prove problematic if abuse is not understood expansively. Physical violence may be remote in time, but the memory of the abuse and the noncustodial parent’s controlling conduct may make it very appropriate for the custodial parent and child to move. I suggest adding a sentence to make this point clear.

Remedies

The remedies included in the Act are incomplete and therefore send an unfortunate message about relocation. For example, there is no provision permitting the court to address the very real economic costs a custodial parent incurs when permission to relocate the child is denied. Professor Theresa Glennon has astutely pointed out that there are real costs from denying the relocation and it is unfair to require the custodial parent to bear those costs alone. See generally Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 Fam. L. Q. 105 (2007). For example, remedies might usefully include a modification of spousal support, child support, or a compensatory award.

The Act does not take an explicit position on the modification of custody, although it clearly permits a change of custody by mentioning this option in the remedies section. The mention of custody modification, without more, is very problematic. It gives the noncustodial parent an enormous advantage in negotiations. Since the Act gives courts no guidance on when they should use this remedy, a court might make the request for relocation determinative in its decision to modify custody, perhaps even ignoring other factors listed in an earlier enacted custody modification statute. The Proposed Act permits a custody modification even when a custodial parent would ultimately be willing to stay in the present location if custody would otherwise be modified; the commentary on page 13 suggests that a court might not want to consider whether the noncustodial parent is willing to relocate with the child if the request is granted or whether a custodial parent will forego relocation if the request is denied.

In my opinion, and consistent with the law in various states, relocation should not constitute a change of circumstance that is alone sufficient to modify custody. I would like to see the drafters harmonize the Proposed Act with the Uniform Marriage and Divorce Act. Perhaps before a court modifies custody it should have to find that a request to relocate is akin to the custodial parent being unfit. Unfitness might exist, for example, if the custodial parent were trying to relocate solely to impede the relationship between the child and noncustodial parent. But the Proposed Act makes giving notice, and then trying to establish one's case in court, an automatic substantial change of circumstance that justifies a modification of custody. Given the extensive literature on children's need for a stable relationship with their primary custodian, it seems contrary to the best interests of children to include this option as a remedy, without more.

Other Issues

Finally, it would be useful to designate categories of noncustodial parents that would not have standing to object to a relocation. For example, the North Dakota statute says notice need not be given if the noncustodial parent has not exercised visitation for one year or has moved to another state and is more than 50 miles from the residence of the custodial parent. While the North Dakota formulation may not be perfect, the sentiment is right. A parent who is not already proximate to the child or involved in the child's life should not have control over the custodial parent's movement.

Along these lines, the definition of "relocate" needs reformulation. The issue is not whether the child is moving more than 50 miles from the current principal residence, but whether the child is moving more than 50 miles from the petitioner. A simple example illustrates: If the custodial and noncustodial parent live 100 miles apart, and the custodial parent wants to move within 30 miles of the noncustodial parent, the Act should not be triggered.

Please do not let my comments detract from my appreciation for your efforts on this initial draft. Your task is a difficult one. I hope these comments help the Committee with the Proposed Act's revision.

Very truly yours,

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